89-354

No. _____

In The

Supreme Court of the United States

October Term, 1989

THE REV. RALPH BROWN, Personal Representative of the Estate of Matthew Swan, Deceased,

Petitioner,

v.

JEANNE LAITNER, JUNE AHEARN and THE FIRST CHURCH OF CHRIST, SCIENTIST, Boston, Massachusetts (The Mother Church), a foreign corporation, Jointly and Severally,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

DAVID R. PARKER
Counsel of Record

SHARON S. LUTZ
J. DOUGLAS PETERS
DAVID W. CHRISTENSEN
4000 Penobscot Building
Detroit, MI 48226
(313) 963-8080
Counsel for Petitioner

91 pp

QUESTION PRESENTED

WHETHER THE FREEDOM TO EXERCISE ONE'S RELIGION GUARANTEED BY THE FIRST AMENDMENT PROVIDES AN ABSOLUTE DEFENSE TO TORT LIABILITY CLAIMS AGAINST CHRISTIAN SCIENCE HEALTH PRACTITIONERS, IN A CASE WHERE THE ACTIONS OF THE PRACTITIONERS LED TO THE DEATH OF AN INFANT.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The trial court's rulings, granting defendants' motion for summary judgment on First Amendment grounds, are set out as Appendix B.[1] The trial court order, based upon the rulings, is set out as Appendix C. The decision of the Michigan Court of Appeals upholding the trial court's dismissal has not been reported. It is reprinted in Appendix D. The order granting plaintiff's application for leave to appeal to the Michigan Supreme Court is reported at 430 Mich 855, 419 NW2d 743 (1988) and is reprinted at Appendix E. The order vacating the Michigan Supreme Court's decision to grant leave is published at 432 Mich 861, 435 NW2d 1 (1989) and is reprinted in Appendix F. The order denying plaintiff's motion for reconsideration of the vacating of the granting of leave is not reported, and is reprinted as Appendix G.

JURISDICTION

The decision of the Michigan Court of Appeals which upheld the dismissal of plaintiff's lawsuit on First Amendment grounds occurred on December 17, 1986. Leave was timely sought in the Michigan Supreme Court, and granted on March 7, 1988. That granting of leave was vacated on February 10, 1989. A timely motion for reconsideration was brought, and was denied on May 31, 1989.

---

[1] Because the trial court went through plaintiff's complaint and struck it paragraph by paragraph, the complaint is included as Appendix A.

The jurisdiction of this court is invoked pursuant to 28 USC § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in relevant part: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner is the representative of the Estate of Matthew Swan. Matthew Swan was a 15 month old child who had meningitis in 1977. Matthew's parents, practicing Christian Scientists at that time, consulted first one practitioner, then another.[2]

---

[2] Practitioners are Christian Science healers who are paid for their services. They have no medical training, and there is no academic prerequisite to certification. The only preparation is a two week course of "primary class instruction" from a "qualified" teacher.

Practitioners hold themselves out to the public at large, as well as Christian Scientists, as professionals qualified to render treatment for mental or physical difficulties. To retain certification, practitioners devote full time to their work. Financial support is provided through payments from their patients, or through reimbursement by third party payors such as Blue Cross/Blue Shield.

Neither of these practitioners effected any improvement upon Matthew's condition. More significantly, the practitioners did not limit themselves to providing Christian Science treatment,[3] but also engaged in medical diagnoses and misleading statements about their ability to determine exactly how sick young Matthew was. As a result of these actions and representations of the practitioners, Matthew's parents delayed taking him to the hospital until it was too late. By the time Matthew was taken to the hospital, his meningitis was so advanced that his tiny brain was riddled with abscesses. Matthew died one week later of a disease which, when timely treated, readily responds to conventional medical therapy.

---

[3] Christian Science treatment is described by the church as prayer only, but at the same time, a type of prayer that Matthew's parents could not give him. A Christian Science practitioner does not allow any other person to give a treatment to the patient while the practitioner is on the case. This is because of the mental domination which the practitioner assumes over the patient.

Christian Science treatment is administered on three levels. The first uses the strategy of "affirmation and denial". The practitioner "employs audible argument to destroy the patient's belief of suffering." Wardwell, Christian Science and Spiritual Healing, in Cox, Religious Systems and Psychotherapy (Springfield: C.C. Thomas, 1973), at 79. At the second level, therapy is augmented by "addressing the thought", or absent treatment, in which the practitioner silently communicates with the patient, often from a distance. The third level, "impersonal treatment", deals with the practitioner's own thought rather than that of the patient. See generally, Braden, Christian Science Today (Dallas: Southern Methodist University Press, 1958), at Chapter 13.

B. Proceedings Below

Based upon the above events, suit was filed against the practitioners Laitner and Ahearn and against the Mother Church, The First Church of Christ, Scientist, on February 5, 1980. (See Appendix A, complaint). All defendants were charged with various acts of negligence and misrepresentation.

Defendants removed the case to federal court on March 10, 1980, pursuant to 28 USC § 1441 and § 1446. However, the District Court for the Eastern District of Michigan remanded the cause to the Wayne County Circuit Court on April 24, 1980, finding that the plaintiffs' claims did not facially arise under the Constitution of the United States within the meaning of 28 USC § 1331.

Defendants then sought summary judgment in the Wayne County Circuit Court. On September 24, 1980, the defendants' motion was granted in part and denied in part. The trial court held that plaintiffs had failed to state a cognizable cause of action in certain allegations in their complaint on the grounds that those allegations were inherently religious, that is, the claims either alleged violations of church-imposed standards of care, or would have called upon the jury to interpret church doctrine. The remaining claims, those which were facially secular, were retained.

The case was set for trial on September 6, 1983. Judge Richard Kaufman opened the proceedings by calling upon counsel to discuss certain issues of law, namely, whether plaintiffs' claims could be properly tried without calling into question the sincerity of the religious beliefs held by defendants. The court reviewed, paragraph by

paragraph, the remaining allegations of plaintiffs' complaint. (See Appendix A). The parties argued, defendants claiming that the First Amendment prohibited any trial on each paragraph, and the court then ruled whether the paragraph in question would be allowed to be presented to the jury. Judge Kaufman ruled that unless plaintiffs could present evidence showing that defendants' beliefs were not sincere, the claim could not go to the jury. (See Appendix B). When this process was completed, Judge Kaufman had dismissed all remaining claims of plaintiffs, including the allegation that defendants had misrepresented their ability to make medical diagnoses and in so doing had induced Matthew's parents to remain under the care of the practitioners, and therefore ordered the entire suit dismissed. (Appendix C).

Plaintiffs appealed this dismissal to the Michigan Court of Appeals. In an unpublished per curiam opinion dated December 17, 1986, the Court of Appeals affirmed Judge Kaufman's decision. (Appendix D). In so doing, the Court of Appeals did not balance defendants' right to freely exercise their religion against young Matthew's right to life. Instead, the Michigan Court of Appeals held that no lawsuit could be brought against one whose beliefs are concededly sincere, where those sincere beliefs underlie conduct claimed to be religiously motivated, on the grounds that the Michigan legislature "has evidenced a policy in favor of the untrammeled exercise of good faith spiritual healing practices." (Opinion of Court of Appeals, Appendix D, at A43).

Plaintiffs appealed this decision to the Michigan Supreme Court, which granted leave on two very narrow issues, in an order dated March 7, 1988. (Appendix E).

These issues were briefed, and orally argued before the Michigan Supreme Court on November 1, 1988. Thereafter, the Michigan Supreme Court vacated its granting of leave, by order dated February 10, 1989. (Appendix F). A timely motion for reconsideration was filed, which was denied on May 31, 1989. (Appendix G).

REASONS FOR GRANTING THE WRIT

I. THE MICHIGAN COURT OF APPEALS' DECISION CREATES A CONFLICT AMONG COURTS IN DIFFERENT STATES ON THE IMPORTANT QUESTION OF WHETHER THE APPLICATION OF CHRISTIAN SCIENCE TEACHINGS IN THE CARE OF SERIOUSLY ILL INFANTS PROVIDES AN ABSOLUTE FIRST AMENDMENT DEFENSE TO LIABILITY.

The Michigan Court of Appeals, in holding that to allow Matthew's action to be heard by the jury would be an impermissible burden upon the First Amendment rights of free exercise of the practitioners, places the government in a position establishing a favored position for faith-healing religions, such as the Christian Science Church. Under the Michigan holding, no matter what harm is done, no matter how unconsenting the one to whom harm is done, freedom of religion (and religious healing) is not to be balanced against other fundamental rights – health, safety and welfare of children included – but is instead established as the only right worthy of protection. The above analysis is in conflict with decisions in other jurisdictions. Its constitutional flaw is its failure to take into account the important interest a state

has in protecting its children. This flaw renders the decision fundamentally wrong pursuant to constitutional principles which have been developed in free exercise cases.

This Court has consistently identified the special position held by children in our society, even those yet unborn, especially when their physical safety is at stake. *Webster* v *Reproductive Health Services*, ___US___; 109 S Ct 3040, 3055, n. 14 (1989). Although the precise question at issue here has not been passed upon by this Court, this Court has recognized that the state has a parens patriae interest in the health and safety of children, and that this interest should be exercised to protect such health and safety even where the exercise may encroach upon free exercise rights. For state courts to refuse to hear facially neutral claims that a child was allowed to die because of negligence and misrepresentation of a third party, merely because that party's actions are motivated by religious belief, constitutes an improper abdication of the state's interests in preserving the health and safety of its children.

In the landmark case of *Prince* v *Massachusetts*, 321 US 158; 64 S Ct 438; 88 L Ed 645 (1944), the court held that a state child labor law did not unduly impinge upon the religious freedom of a Jehovah's Witness convicted for allowing her niece to distribute religious literature on a street corner. Public dissemination of religious literature by adults and children alike is an integral part of the Jehovah's Witness faith, as was testified by witnesses in the trial court. The act of allowing the child to distribute literature was conceded by all to be motivated by a

sincere religious belief in this tenet of faith. The Massachusetts law which prohibited children from participating in the distribution of religious literature clearly imposed a significant burden upon complete compliance with the faith of the parents. Nevertheless, the court ruled that both free exercise and parental rights must be curtailed where necessary to advance the state's profound interest in the health and safety of its children:

> "The state's authority over children's activities is broader than over like actions of adults. . . .A democratic society rests, for its continuance, upon the happy, well-rounded growth of young people into full maturity of citizens, with all that implies. It may secure this against impending restraints and dangers within a broad range of selection." 321 US at 168. "Parents may be free to be martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." 321 US at 170.

The *Prince* decision did not create new law; it merely reaffirmed previous law which created a dichotomy in free exercise clause jurisprudence: Free exercise rights may properly prevail over secular matters affecting adults, but they must yield when an important state interest, such as the well-being of its children, is threatened. See, for example, *Reynolds v United States*, 98 US 145; 25 L Ed 244 (1878); *Cantwell* v *Connecticut*, 310 US 296; 84 L Ed 1213; 60 S Ct 900 (1940).

This Court next confronted this issue some 24 years later. Citing *Prince* as sole authority, this Court affirmed a

district court's decision in *Jehovah's Witnesses of Washington v King County Hospital*, 278 F Supp 488 (D Wash 1967); aff'd 390 US 598; 88 S Ct 1260; 20 L Ed 2d 158; reh den'd, 391 US 961; 88 S Ct 1844; 20 L Ed 2d 874 (1968). This Court rejected the claim that the free exercise rights of Jehovah's Witness parents had been abridged when blood transfusions were ordered for their minor child over the parents' objections.

Jehovah's Witnesses are prohibited from receiving blood transfusions because of their religion's interpretation of certain scriptural passages. The parents sincerely believed that they had a God-given responsibility to apply this tenet to their children, on pain of irrevocable spiritual harm to both the child and the parent. The transfusions were nonetheless ordered on the authority of a state neglect statute authorizing care, custody and commitment of a medically neglected child. 278 F Supp at 495. The trial court held that the statute as applied did not offend the parents' First Amendment religious rights, correctly recognizing *Prince* as the governing authority:

> "It is true that in *Prince*, the court made clear that it did not intend that opinion to lay a foundation for every state intervention in the indoctrination and participation of children in religion which may be done in the name of their health and welfare. But we think it does lay the foundation binding upon us, for the particular state intervention in the name of health and welfare which is here under review. As stated in *Prince*, 321 US at 166, 64 S Ct at 442, 'the right to practice religion freely does not include liberty to expose the child . . . to ill health or death.' " 278 F Supp at 504.

This reading of *Prince* was explicitly upheld in this Honorable Court's summary affirmance of the district court's opinion.

The above principle was next encountered, and, in dicta, reaffirmed, in *Wisconsin* v *Yoder*, 406 US 205, 233-234; 92 S Ct 1526; 32 L Ed 2d 15 (1972), when this Court explained: "To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."

The parallels between the facts in *Jehovah's Witnesses* and those in the case at bar are striking. The secular effect of the parents' refusal to permit blood transfusions for their child was to endanger his life. This risk of death, though the result of the exercise of a sincerely motivated legitimate free exercise right, was anathema to the state's compelling interest in protecting its children from harm, and was not tolerated. In the instant case, however, the state has taken the opposite tack. To permit Christian Science practitioners to tortiously act, using misrepresentations and overbroad claims of their own ability to discern disease and its processes, exposes children like Matthew Swan to imminent danger from normally treatable diseases such as bacterial meningitis. Yet, the Michigan state court decisions granted carte blanche to all such tortious actors, by refusing to allow an after-the-fact civil suit brought in the name of the deceased child, on the grounds that the free exercise rights of the practitioners were so absolute as to brook no restriction. It is extremely doubtful that a state legislature could grant a blanket

exemption from civil liability for *any* conduct by a religious healer, so long as it is claimed to be religiously motivated. *Larson* v *Valente*, 456 US 228, 244; 102 S Ct 1673, 1683; 72 L Ed 2d 33 (1982). Similarly, state courts cannot constitutionally grant such exempt status.

What plaintiff sought in the Michigan courts is to be permitted to present evidence that actions of defendants, no matter how religiously motivated, and no matter how sincere, induced plaintiff's parents into doing that which was ultimately fatal to the plaintiff, Matthew Swan. It is important to note here what plaintiffs are not asking for. Plaintiffs are not asking that Christian Science practitioners be prohibited from treating illness through prayer. Plaintiffs are not requesting a blanket prohibition of Christian Science treatment to children. Instead, plaintiff has brought specific secular claims. The Christian Science practitioners, faced with parents who were tempted to take the child to a medical doctor, went beyond prayer alone, and misrepresented their ability to diagnose, and to discern disease and its processes, in order to persuade the parents to let the child remain in their care. These claims can be heard in a trial court without reference to the truth or falsity of a belief in healing through prayer. These claims can be decided despite the fact that defendants' beliefs are admittedly sincere. Instead, plaintiffs are requesting that this Court reaffirm the law, ignored by the Michigan courts, that when a compelling state interest collides with an individual's right to free exercise of religion, the First Amendment interest does not inevitably assume prominence. *Cantwell* v *Connecticut*, 310 US 296; 84 L Ed 1213; 60 S Ct 900 (1940); *Prince* v *Massachusetts*, 321 US 158; 64 S Ct 438; 88 L Ed 645 (1944). The

Michigan courts erred in failing to balance one interest against the other. The identification of a conflict between fundamental rights is:

> "Only the beginning . . . and not the end of the inquiry. Not all burdens on religion are unconstitutional. [citations omitted]. The states may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." [citations omitted]. *United States* v *Lee*, 455 US 252, 257; 102 S Ct 1051; 71 L Ed 2d 127 (1982).

The Michigan court's action in erecting the First Amendment as an absolute barrier to access to the courts in a matter involving the life of a child is directly in conflict with the holding in *Walker* v *Superior Court*, 47 Cal 3d 112, 253 Cal Rptr 1; 763 P2d 852 (1988), cert den'd 109 S Ct 3186 (1989). In *Walker*, defendant claimed that their conduct was "absolutely protected from criminal liability by the First Amendment to the United States Constitution." *Id*, 253 Cal Rptr at 18. The California Supreme Court determined that it was not, engaging in the following analysis:

> "The First Amendment bars government from prohibiting the free exercise of religion. Although the clause absolutely protects religious belief, religiously motivated conduct 'remains subject to regulation for the protection of society.' (*Cantwell* v *Connecticut* (1940) 310 US 296, 303-304, 60 S Ct 900, 903, 84 L Ed 1213). To determine whether government regulation of religious conduct is violative of the First Amendment, the gravity of the state's interest must be balanced against the severity of the religious imposition. (*Wisconsin* v *Yoder* (1972) 406 US 205, 221, 92 S Ct 1526, 1536, 32 L Ed 2d 15). If the regulation is justified in view of the

> balanced interest at stake, the free exercise clause requires that the policy additionally represent the least restrictive alternative available to adequately advance the state's objectives. (*Thomas* v *Review Board of Indiana Employment Security Division* (1981) 450 US 707, 718, 101 S Ct 1425, 1432, 67 L Ed 2d 624)." *Id* at 18.

Engaging in this mandatory analysis, the California court found that a criminal prosecution of the parent who refused to obtain conventional medical help, relying instead on Christian Science practitioners for treatment of a critically ill child, is not prevented by the First Amendment.

The Michigan courts have committed an error of constitutional dimensions in refusing to engage in this balancing of competing interests. The after-the-fact civil liability sought to be imposed on the practitioners in this case for their acts of persuading the parents to forego medical care through misrepresentations and misstatements is a less restrictive alternative than the imposition of criminal sanctions thereon, as in *Walker*. Michigan is not free under the Constitution to close its courts to those who seek civil remedy for tortious acts which were a factor in causing a child's death.[4]

---

[4] Indeed, for Michigan courts to do so, based upon a misreading of the First Amendment Free Exercise Clause and an unwise reading of legislative intent (in statutes similar to those found not to preclude criminal prosecution in *Walker*), should be deemed an unconstitutional preference of faith-healing religions, prohibited by the Establishment Clause of the First Amendment. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v *Valente*, 456 US 228, 244; 102 S Ct 1673, 1683; 72 L Ed 2d 33 (1982).

Plaintiff requests this Honorable Court to hold that the practitioners' freedom to act, no matter how religiously motivated those acts, and no matter how sincere the motivation, must be subject to civil liability when involving highly vulnerable, critically ill infants such as Matthew Swan. Exposure to civil liability in common law negligence and misrepresentation serves fundamental interests by imposing an objective standard of reasonableness upon the conduct of the practitioners in treating children, who by definition cannot consent to the religious treatment. The practitioners are being asked to do nothing more than behave as a reasonable person under the circumstances, e.g., while taking responsibility for the care and treatment of a desperately ill child. At present, because of the Michigan courts' decisions, there are no checks on the conduct of religious healers in treating children in Michigan. Such untrammeled exercise of good faith healing practices is not dictated by this Court's free exercise jurisprudence, is repugnant to this Court's Establishment Clause jurisprudence, and fails to take into account the profoundly important societal interest in the provision of medical care to gravely ill children. *Prince* v *Massachusetts*, 321 US 158; 64 S Ct 438; 88 L Ed 645 (1944); *Jehovah's Witnesses of Washington* v *King County Hospital*, 278 F Supp 488 (D Wash 1967) aff'd 390 US 598; 88 S Ct 1260; 20 L Ed 2d 874 (1968).

II. THE MICHIGAN COURT OF APPEALS' OPINION IMPROPERLY LIMITS THE TORT LIABILITY OF A CHURCH AND ITS AGENTS FOR ACTIONS WHICH, ALTHOUGH RELIGIOUSLY MOTIVATED, ARE CIVILLY ACTIONABLE.

The Michigan Court of Appeals, in upholding the decision of the trial court, refused to consider the fact

that the conduct of the practitioners was pled as tortious. Instead, it focused only upon the sincerity with which the Christian Science beliefs were held, and the fact that those sincere beliefs motivated the conduct in question. Such is an improper analysis under the First Amendment, and squarely conflicts with the holding in *Molko* v *Holy Spirit Ass'n*, 46 Cal 3d 1092, 47 Cal 3d 470A, 252 Cal Rptr 122; 762 P2d 46 (1988), cert den'd 109 S Ct 2110 (1989). The Michigan Court of Appeals' decision that the First Amendment commands that the state allow untrammeled exercise of good faith religious healing practices serves to incorrectly bar plaintiff from bringing a suit sounding in negligence and misrepresentation against Christian Science practitioners.

Molko involved a similar issue to that presented in the instant petition. Plaintiffs in *Molko* sought recovery for fraudulent conduct which defendant sought to argue was based on sincere religious belief and was religiously motivated and therefore not actionable. As pointed out by the *Molko* court,

> "While judicial sanctioning of tort recovery constitutes state action sufficient to invoke the same constitutional protections applicable to statutes in other legislative actions (*New York Times* v *Sullivan* (1964) 376 US 254, 265, 84 S Ct 710, 718, 11 L Ed 2d 686), religious groups are not immune from all tort liability. It is well settled, for example, that religious groups may be held liable in tort for secular acts. (See, e.g., *Malloy* v *Fong* (1951) 37 Cal 2d 356, 372, 232 P2d 241 [religious corporation liable for negligent driving by employee].) Most relevant here, in appropriate cases courts will recognize tort liability even for acts that are religiously motivated. (See, e.g., *O'Moore* v *Driscoll* (1933) 135 Cal App

> 770, 778, 28 P2d 438 [allowing priest's action against his superiors for false imprisonment as part of their effort to obtain his confession of sins]; *Bear* v *Reformed Mennonite Church* (1975) 462 Pa 330, 341 A2d 105, 107 [allowing action for interference with marriage and business interests when church ordered congregation to shun former member]; *Carrieri* v *Bush* (1966) 69 Wash 2d 536, 419 P2d 132, 137 [allowing action for alienation of affections when pastor counseled woman to leave husband who was 'full of the devil']; *Candy H* v *Redemption Ranch, Inc,* (MD Ala 1983) 563 F Supp 505, 516 [allowing action for false imprisonment against religious group]; *Van Schaick* v *Church of Scientology of California, Inc* (D Mass 1982) 535 F Supp 1125, 1135 ['causes of action based upon some prescribed conduct may, thus, withstand a motion to dismiss even if the alleged wrongdoer acts upon a religious belief or is organized for a religious purpose'].)" *Id,* 762 P2d at 57-58.

As in the *Molko* decision, plaintiffs herein are not questioning the sincerity of defendants' religious beliefs. Plaintiffs are also not requesting that the truth or falsity of those beliefs be placed on trial. Indeed, plaintiffs insist that a trial can be had on the secular conduct engaged in by defendants and whether it is civilly actionable, without calling religion into question at all. In fact, the instant case is more compelling than *Molko* in that it involves the death of a very young child alleged to have been caused, in part, by misrepresentation of defendants' practitioners in holding themselves out as able to discern disease and diagnose and evaluate disease processes. This holding

out was relied on by the parents to the detriment of young Matthew Swan.[5]

This important area of the tort liability for actions which are claimed to be religiously motivated is too important to leave to state by state development. The uniform development of federal constitutional law is at stake, as well as the lives of children such as Matthew.

CONCLUSION

The decisions below construct a First Amendment wall preventing civil actions brought by injured parties against religiously motivated actors, whose conduct deprives children of their right to be alive and healthy. The decisions below, by failing to engage in proper constitutional balancing, and by establishing First Amendment concerns as the only interest at stake, is clearly erroneous, and is clearly a danger to both the lives of children in Michigan and to the uniform development of

[5] The defendants below argued that the parents should be solely responsible for the death of the child, as an alternate ground upon which to uphold the trial court's decision. Should such argument again be attempted here, plaintiffs point out to the court that the parents might indeed be found to be partially at fault. However, the degree of such fault cannot be determined on the instant record, was not the subject of factfinding by the trial court in support of its dismissal, and would be a factual matter for the jury, either in determining that the parents' actions were a proximate cause, or in determining a reduction to an eventual damage award for the comparative negligence of the parents.

federal constitutional free exercise jurisprudence. For these reasons, this Honorable Court should grant a writ of certiorari in the above captioned action.

Respectfully submitted,

CHARFOOS & CHRISTENSEN, P.C.

DAVID R. PARKER
Counsel of Record

SHARON S. LUTZ
J. DOUGLAS PETERS
DAVID W. CHRISTENSEN
Counsel for Petitioner

4000 Penobscot Building
Detroit, MI 48226
(313) 963-8080

APPENDIX A

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

ALAN A. MAY, Personal Representative of the Estate of MATTHEW SWAN, Deceased, and DOUGLAS SWAN and RITA SWAN, Individually,

Plaintiffs,

-vs-

JEANNE LAITNER, JUNE AHEARN and THE FIRST CHURCH OF CHRIST, SCIENTIST, in Boston, Massachusetts, (The Mother Church), a foreign corporation, Jointly and Severally,

Defendants.

Civil Action Number
80 004 605 NI

COMPLAINT AND DEMAND FOR JURY TRIAL

NOW COME the plaintiffs, ALAN A. MAY, Personal Representative of the Estate of MATTHEW SWAN, Deceased, and DOUGLAS SWAN and RITA SWAN, Individually, by and through their attorneys, CHARFOOS & CHARFOOS, P.C. and complain against the defendants and for their case of action, state as follows:

1. That ALAN A. MAY is the lawfully appointed personal representative of the Estate of MATTHEW SWAN, Deceased, and brings this lawsuit in that capacity.

2. That plaintiffs, DOUGLAS SWAN and RITA SWAN, parents of plaintiff's decedent, MATTHEW SWAN, were, at all times pertinent hereto, residents of the City of Grosse Pointe Park, County of Wayne, State of Michigan.

3. That defendant, JEANNE LAITNER, is and was at all times pertinent hereto, a Christian Science Practitioner residing and conducting business in the City of Grosse Pointe Park, County of Wayne, State of Michigan.

4. That defendant, JUNE AHEARN, is and was, at all times pertinent hereto, a Christian Science Practitioner residing and conducting business in the City of St. Clair Shores, County of Macomb, State of Michigan.

5. That defendant, THE FIRST CHURCH OF CHRIST, SCIENTIST in Boston, Massachusetts (The Mother Church), at all times pertinent hereto, carried on a continuous business in the County of Wayne, State of Michigan.

6. That defendant, THE FIRST CHURCH OF CHRIST, SCIENTIST in Boston, Massachusetts, is a foreign corporation doing business in the County of Wayne, State of Michigan.

7. That at all times pertinent hereto, plaintiffs, DOUGLAS SWAN and RITA SWAN, parents of plaintiff's decedent, Matthew Swan, were practicing Christian Scientists.

8. That Matthew Swan was born on March 3, 1976.

9. That on June 17, 1977, defendant, JEANNE LAITNER, was contacted by the parents of Matthew Swan because of a "knee problem" he was experiencing.

10. That on said date, defendant, JEANNE LAITNER, administered a treatment in absentia.

11. That on the morning of June 18, 1977, defendant, JEANNE LAITNER, was again contacted because of Matthew Swan's continued knee problem and fever.

12. That on the afternoon of June 18, 1977, the fever was worse and Matthew Swan was limp.

13. That said symptoms were reported to defendant, JEANNE LAITNER, who suggested, per telephone, that Matthew Swan may be cutting a tooth.

14. That on June 19, 1977, defendant, JEANNE LAITNER, was contacted on three (3) occasions and treatments for Matthew Swan were rendered in absentia.

15. That on the morning of June 20, 1977, defendant, JEANNE LAITNER, made a home visit and gave treatment to Matthew Swan.

16. That at said time, Matthew Swan was immobile and expressionless.

17. That on the afternoon of June 20, 1977, defendant, JEANNE LAITNER, made another home visit and as of said time Matthew Swan had not walked, sat or crawled for three days.

18. That on the morning of June 21, 1977, defendant, JEANNE LAITNER, made her third home visit and rendered a treatment to Matthew Swan.

19. That defendant, JEANNE LAITNER, was contacted on two (2) subsequent occasions on June 21, 1977 because of Matthew Swan's difficulty in swallowing.

20. That in the evening of June 21, 1977, defendant, JEANNE LAITNER, made a house call, rendered a treatment and determined that Matthew Swan was "making progress".

21. That in the morning of June 22, 1977, defendant, JEANNE LAITNER, was contacted again regarding Matthew Swan as he was worse than the evening before.

22. That in the afternoon of the same day, defendant, JEANNE LAITNER, was contacted again.

23. That on the morning of June 23, 1977, Matthew Swan's condition was worse.

24. That at all times pertinent hereto Matthew Swan's parents were terrified of rejecting Christian Science teachings and doctrines because of "warnings" conveyed to them by the defendants.

25. That on the morning of June 23, 1977, defendant, JUNE AHEARN, was contacted to treat Matthew Swan.

26. That defendant, JUNE AHEARN, was contacted a second time on June 23, 1977 and indicated to the parents of Matthew Swan that "materia medica" could not help.

27. That defendant, JUNE AHEARN, was contacted again on the evening of June 23, 1977 because Matthew Swan was eating again.

28. That on June 24, 1977, Matthew Swan was purportedly in pain when his spine was touched. Said information was conveyed to defendant, JUNE AHEARN.

29. That defendant, JUNE AHEARN, indicated she was working on a claim of "paralysis."

30. That defendant, JUNE AHEARN, was contacted several times on June 24, 1977, at which time, defendant, JUNE AHEARN, suggested plaintiff, RITA SWAN, write a letter to her father.

31. That on June 25, 1977, defendant, JUNE AHEARN, was contacted several times because of Matthew Swan gnashing his teeth. Defendant, JUNE AHEARN, indicated she knew her work was effective.

32. That on June 26, 1977, defendant, JUNE AHEARN, made a house call to Matthew Swan for the first time; and further that at said visit Matthew Swan had a fixed, glass stare.

33. That on the evening of June 26, 1977, Matthew Swan began screaming at frequent intervals and a contact was made with defendant, JUNE AHEARN, who rendered a treatment.

34. That on the morning of June 27, 1977, defendant, JUNE AHEARN, was contacted again.

35. That at said time the parents of Matthew Swan indicated they were going to seek medical treatment.

36. That defendant, JUNE AHEARN, indicated to the plaintiffs, DOUGLAS SWAN and RITA SWAN, they would have a long, hard road back to Christian Science if they turned to medicine and that such thoughts were responsible for Matthew's condition because, "To rely on any material means for healing, or to endeavor to mix spiritual means with the material is not in accord with Christian Science. Such a departure, instead of helping

the patient, can only result in limiting the demonstration of scientific healing power."[1]

37. That defendant, JUNE AHEARN, suggested getting a Christian science nurse as she would not interfere with the work of the practitioner and was a better alternative than resorting to "medicine."

38. That the parents of Matthew Swan attempted to contact a Christian Science Nurse.

39. That throughout the day of June 27, 1977, several calls were made to defendant, JUNE AHEARN, requesting emergency treatment.

40. That the parents were again told by defendant, JUNE AHEARN, that they should be able to work this out without turning to medicine.

41. That on June 27, 1977, a Christian Science "nurse" appeared at the home of Matthew Swan and indicated that "fever was just fear."

42. That on the evening of June 27, 1977, defendant, JUNE AHEARN, was called because Matthew Swan couldn't blink his eyes and they were blood shot. Defendant, JUNE AHEARN, indicated that the parents were holding up the healing.

43. That on the morning of June 28, 1977, defendant, JUNE AHEARN, was contacted again, and told the Swans not to call so frequently as she was handling the case and wouldn't let up.

---

[1] Christian Science Journal, November, 1957, page 598.

44. That on the evening of June 28, 1977, plaintiff, RITA SWAN called defendant, JUNE AHEARN, again – Matthew Swan was delirious and deranged.

45. That defendant, JUNE AHEARN, indicated the Church needed to purify itself against members who turned to "materia medica," i.e., medicine.

46. That on the morning of June 29, 1977 Matthew Swan's symptoms of moaning, gnashing of teeth were reported to defendant, JUNE AHEARN, who indicated it was a pacifier for children to moan when they were sick.

47. That on the afternoon of June 29, 1977, defendant JUNE AHEARN, was contacted with the information that Matthew Swan was not swallowing.

48. That defendant, JUNE AHEARN, indicated that if Matthew Swan could take any nourishment, he should not be taken to the hospital.

49. That defendant, JUNE AHEARN, made a house call on the evening of June 29, 1977.

50. That at said visit, defendant, JUNE AHEARN, indicated two claims came to mind – paralysis and rheumatic fever.

51. That on the morning of June 30, 1977, defendant, JUNE AHEARN, was contacted again regarding Matthew Swan's condition; and that she suggested maybe Matthew Swan had a broken bone in his neck.

52. That on the afternoon of June 30, 1977, Matthew Swan was taken to St. John Hospital.

53. That at said time Matthew Swan was suffering from brain abscesses secondary to bacterial meningitis.

54. That bacterial meningitis is a medically treatable disease.

55. That on July 7, 1977, Matthew Swan expired.

56. That at no time between June 17, 1977 and July 7, 1977, was the Committee on Publications for the Christian Science Church contacted by defendant practitioners.

57. That it is an obligation, based on the teachings and publications of the Church, that a practitioner report to the Committee on Publications cases where a child's condition is not improved.

58. That it is an obligation of a practitioner to frequently visit a child who is being treated for a condition which may be deemed serious.

59. That defendant, JEANNE LAITNER, and defendant, JUNE AHEARN, and any and all nurses or nurse aides, were at all times pertinent hereto acting as agents/servants of the Christian Science Church.

60. That defendant, JEANNE LAITNER, and defendant, JUNE AHEARN, charged for their services as Christian Science Practitioners.

61. That defendant practitioner had an obligation to see that suspected communicable disease is reported to a local health official.

62. That bacterial meningitis is a reportable communicable disease.

63. That the Christian Science Church is responsible for the negligence of its practitioners, nurses, agents and servants.

COUNT I

NEGLIGENCE OF DEFENDANTS, JEANNE LAITNER AND JUNE AHEARN

64. That plaintiffs hereby incorporate by reference each and every allegation contained in Paragraphs 1 through 63 of their Complaint as though the same were set forth herein word for word and paragraph by paragraph.

65. That defendants owed a duty to the plaintiffs to perform their practitioner work in accordance with the rules and regulations of the Christian Science Church.

66. That defendants breached that duty in the following particulars:

(a) That neither defendant reported the case of Matthew Swan to the Committee on Publications.

(b) That defendant, JUNE AHEARN, failed to frequently visit Matthew Swan.

(c) That neither practitioner saw to it that Matthew Swan's case was reported to the local health official.

(d) That defendant, JEANNE LAITNER and defendant, JUNE AHEARN, owed a duty to send a Christian Science nurse with a card to assess Matthew Swan.

(e) That defendants speculated, and thus engaged in diagnosing, as to the reason for Matthew Swan's problems, i.e., cutting a tooth, roseola, rheumatic fever and paralysis.

(f) In failing to consult with a physician on the anatomy involved.

(g) In failing to communicate to the parents any change in Christian Science policy regarding medical treatment of minor children if in fact there had been one.

(h) That said breaches of duty were the proximate cause of Matthew Swan's demise.

67. That defendant, JEANNE LAITNER, and defendant, JUNE AHEARN, owed Matthew Swan a duty to act as reasonable, prudent persons would under like and similar circumstances.

68. That defendant, JEANNE LAITNER, and defendant, JUNE AHEARN, breached said duty when they coerced the parents of Matthew Swan to not seek medical attention.

69. That said breach was the proximate cause of Matthew Swan's demise.

70. That said defendant, First Church of Christ, Scientist, is responsible for the negligent acts of its practitioners/agents/servants and for failing to supervise the reporting requirements of the Committee on Publications.

COUNT II

MISREPRESENTATION OF DEFENDANT PRACTITIONERS

71. That plaintiffs hereby incorporate by reference each and every allegation contained in Paragraphs 1 through 63, and Paragraphs 64 through 70, and all subparagraphs thereof, of Count I of their Complaint as though the same were set fourth herein word for word and paragraph by paragraph.

72. That the defendant practitioners represented to plaintiffs:

(a) That medical treatment would offer no solution to the symptoms Matthew Swan was experiencing.

73. That said representations were false and misleading.

74. That based upon their entrenchment in the Christian Science religion, Matthew Swan's parents had a right to rely on said representations.

75. That plaintiffs did rely on said representations to their detriment.

COUNT III

NEGLIGENCE OF DEFENDANT, FIRST CHURCH OF CHRIST, SCIENTIST

76. That plaintiffs hereby incorporate by reference each and every allegation contained in Paragraphs 1 through 63, Paragraphs 64 through 70 of Count I and Paragraphs 71 through 75 of Count II, and all subparagraphs thereof, of their Complaint as though the same were set forth herein word for word and paragraph by paragraph.

77. That defendant, First Church of Christ, Scientist, owed to plaintiffs a duty to operate a healing ministry in such a way as to not cause damage to minor children.

78. That defendant, First Church of Christ, Scientist, breached that duty in the following particulars:

(a) by failing to sufficiently educate and train practitioners and nurses in their treatment with and of small children.

(b) By failing to instruct practitioners in the rudiments of communicable/notifiable disease so that reporting obligations could be carried out.

(c) By failing to adequately monitor and supervise the activities of practitioners and nurses in their treating of minor children.

(d) By failing to make sure that practitioners adhere to the rules and regulations of the Church in their treating of minor children.

(e) By failing to have promptly available to Matthew Swan the services of an appropriate nurse with practical wisdom.

(f) By holding out, through its rules and regulations, that reporting a non improved condition of a minor child to the Committee on Publications would effectuate a superior healing.

(g) By failing to communicate to practitioners and members a change in policy regarding medical treatment of children if in fact there had been one.

79. That the breach of the aforesaid duties was the proximate cause of the death of Matthew Swan.

COUNT IV

MISREPRESENTATION OF DEFENDANT, FIRST CHURCH OF CHRIST, SCIENTIST

80. That plaintiffs hereby incorporate by reference each and every allegation contained in Paragraphs 1

through 63, Paragraphs 64 through 70 of Count I, Paragraphs 71 through 75 of Count II, Paragraphs 76 through 79 of Count III, and all subparagraphs thereof, of their Complaint as though the same were set forth herein word for word and paragraph by paragraph.

81. That defendant, First Church of Christ, Scientist, represented to plaintiffs that:

(a) Practitioners were able to determine when a child was not progressing.

(b) Practitioners were able to determine if a child had a communicable/notifiable disease.

(c) Appropriately trained nurses, who understood practical wisdom, were available.

(d) Cures cannot be found with medical means.

(e) A cure does not take place if a parent's thinking is faulty.

82 That plaintiffs had a right to rely on said representations.

83. That the representations were false.

84. That the representations were the proximate cause of Matthew Swan's death.

85. That as a direct and proximate result of the negligence and misrepresentations of the defendants, plaintiff, ALAN A. MAY, claims damages under the Wrongful Death Act for all damages allowable under said Act.

86. That plaintiffs, DOUGLAS SWAN and RITA SWAN, from June 17, 1977 through July 7, 1977, witnessed the suffering of Matthew Swan.

87. That it was reasonably foreseeable that negligent infliction of injury on Matthew Swan would be witnessed by said parents and would cause mental anguish.

88. That as a direct and proximate result, plaintiffs, DOUGLAS SWAN and RITA SWAN, underwent an inability to function as they did previously and continue to be in a state of depression.

89. That the amount in controversy in the within cause exceeds TEN THOUSAND DOLLARS ($10,000.00).

WHEREFORE, plaintiffs pray that this Honorable Court enter a Judgment in their favor and against the defendants in whatever amount they are found to be entitled, in accordance with all the proofs to be presented herein, together with interest, costs and attorney fees so wrongfully incurred.

CHARFOOS & CHARFOOS, P.C.

By: /s/ Sharon S. Lutz
SHARON S. LUTZ (P24094)

/s/ David W. Christensen
DAVID W. CHRISTENSEN (P11863)

Attorneys for Plaintiffs
4000 City National Bank Bldg.
Detroit, Michigan 48226
963-8080

DEMAND FOR JURY TRIAL

NOW COME the above named plaintiffs, by and through their attorneys, CHARFOOS & CHARFOOS, P.C., and hereby demand a trial by jury of the within cause.

CHARFOOS & CHARFOOS, P.C.

By: /s/ Sharon S. Lutz
SHARON S. LUTZ (P24094)

/s/ David W. Christensen
DAVID W. CHRISTENSEN (P11863)

Attorneys for Plaintiffs
4000 City National Bank Bldg.
Detroit, Michigan 48226
963-8080

DATED: February 5, 1980

APPENDIX B

9-6-83

* * *

(p. 67) THE COURT: Okay. Thank you very much.

I have opened up the discussion in this case on two principles that I thought would be important to my decision on a number of matters. One of those was – and I think it is pretty clearly the law surrounding freedom of religion and application of it to positions of civil liability – and that is if a cause of action requires the fact finder to be deeply imbedded in a controversy between what church-policy tenets require and what they don't, the First Amendment freedom-of-religion clause does not allow that to occur.

Plaintiffs have, to some extent, basically tried to describe this case as merely putting all the evidence in and (p. 68) instructing a jury, "If you think the defendants were reasonable under the circumstances, find for them, but if you think they were unreasonable under the circumstances, find for the plaintiffs."

Health care is important. Children's sicknesses are important. I, obviously, like most people, have my own personal opinions about which ways parents should deal in taking care of their children and what should be believed and what shouldn't. However, in application of a clear rule of law, I can't envision how trial of an action of failure to frequently visit Matthew does not require analysis of what Christian Science teachings require and

don't require as to visiting Matthew under these circumstances, one of the requirements being that they be Christian Science practitioners.

For that reason, I will grant summary judgment on Roman numeral "I," Arabic "1."

Now I will give each side a chance to say anything that they want to before I rule on Roman numeral "I," Arabic "2," and Roman numeral "II," Arabic "2," a, b, c and d.

* * *

(p. 76) THE COURT: Okay. Thank you very much.

You know, no matter how wrenched my heart can be by particular facts of a case – this one is a moving situation – it is my duty as a judge, at least in following the constitutional provisions under the First Amendment, in not allowing a (p. 77) civil trial to be an attack on religious beliefs, no matter how much I may disagree with them personally or not. I cannot see how a trial on Roman numeral "I," Arabic "2," and Roman numeral "II," Arabic "2," a through d, would not require an assessment of what Christian Science requires and what it doesn't require to determine what was reasonable under those circumstances and what was not reasonable. I believe that gets a civil court too deeply imbedded in determining what the rightness or wrongness of a particular religion is.

For that reason and for the reasons I mentioned in my earlier summary judgment, I will grant summary judgment for the defendants on all those counts.

* * *

(p. 86) THE COURT: Okay. As you said, although that is interesting and may be relevant to some things in the case, I am still faced with the rule of law that I had coming here today and I had leaving this morning's session, that we have to look at the subjective intent of the speaker. If his subjective intent was to make a sincerely-held statement about religion, then that cannot be the basis of imposing civil liability. Therefore, to my mind, a question of fact has to be created that any of the statements that you just indicate would support your allegation of negligence, to-wit, "In coercing parents not to get medicine," there is a question of fact as to that. I don't see that, and for that reason I will grant summary judgment on that one.

* * *

(p. 89) THE COURT: Once again, as I said before, I do think, given the strong case law that interprets First Amendment freedom of religion, that if defendants respond to an allegation or something that is a misrepresentation by saying that was a statement of a sincerely-held religious belief, that it is the plaintiffs' burden to show some evidence to create a factual question that, in fact, that statement was not a statement of a sincerely-held religious belief. Again plaintiffs are arguing, as I have indicated, if there is going to be an exception in this area, then statements that have an impact upon the health of children may be such an area; but until such an exception is made by a higher court, it seems to me that application of GCR 117.2(3), with a backdrop of the First Amendment freedom-of-religion clause, requires the plaintiffs to give some admissible evidence to rebut the

defendants' would-be testimony that these are statements of a sincerely-(p. 90)held religious belief. Having heard none, I will grant summary judgment on Roman numeral "III," Nos. 1, 3, 4, 5 and 6.

MR. CHRISTENSEN: Could I try again, Judge, on that if I can?

THE COURT: Sure.

* * *

(p. 95) THE COURT: I haven't granted summary judgment on a statement of that nature, "a perfectly healthy baby to me." That sounds like a specific diagnosis. I have not ruled on Roman numeral "III," Arabic "2," or Roman numeral "I," Arabic "3," yet. I am only on 1, 3, 4, 5 and 6 after Roman numeral "III," and neither one of those do I find is a specific diagnosis. So don't talk about those yet. I am dealing with 1, 3, 4, 5 and 6.

Okay. I am still imbedded in my analysis that I need more than just statements to create a factual question as to that, and I will grant summary judgment on Roman numeral "III," 1, 3, 4, 5 and 6.

* * *

(p. 103) THE COURT: Once again, I think, to be consistent with the First Amendment freedom-of-religion clause, it is the plaintiffs' burden to, at a minimum, not even reaching the (p. 104) question Mr. Christopher, I am sure, is eager at some point to discuss – probably not if I rule for him – but the question: If there is a factual question, given the First Amendment, can I give it to the jury?

It is clear to me the first analysis is: Is there a factual question upon which a fact finder can find these are not religious statements? Given the fact the defendants have indicated they have testimony they are all statements of sincerely-held religious beliefs and the plaintiffs have only indicated they are statements that, upon their face, are in line with the one context that they think creates a factual situation, I do not think that is sufficient to overcome the First Amendment protection. Therefore, I will grant summary judgment on Roman numeral "IV," Arabic "2," a, b, c and d.

MR. CHRISTENSEN: You are including my application of plain conduct, as well?

THE COURT: I don't see how any misrepresentation claim which is a misstatement can be conduct.

MR. CHRISTENSEN: I understand.

THE COURT: If I am correct, according to my rulings we are down to the question of specific statements of diagnoses. Before we get to that, I want to make sure I haven't missed anything.

MR. CHRISTENSEN: You haven't, Judge.

* * *

9-7-83

(p. 15) MR. CHRISTENSEN: Well, Judge, it seems to me that what has been offered as religious belief, if we go back to polygamy activity, or if we go back to –

THE COURT: (Interposing) No case has ever said you can't believe in polygamy. It just says you can't have the conduct.

MR. CHRISTENSEN: And I'm saying, and I'm telling this Court that they can believe that illness is disharmony. They can believe that. But don't set up a program that lets small children suffer the consequences of that belief. Don't impose that without a consequence, without a legal consequence. And I even said, as I said yesterday, I even said that that, I'm not suggesting that that could not be defense in a court of law, that they could come in and say that's the way we were doing it, that a jury could one day decide on whether or not they could be exculpated for such activity.

THE COURT: Okay. Anybody got anything else they want to say before I rule?

MR. CHRISTENSEN: No, Your Honor.

MR. CHRISTOPHER: No.

THE COURT: So that the record is clear – and I assume there is a good chance that there will be (p. 16) an appellate review of most, if not all of my decision in this case – I think the Pleading that was filed by Plaintiff, allegations of negligence and misrepresentation will be helpful to them, because all my rulings have been geared to that in discussions, have either talked about one in specific or in discussions have talked about a number of those, and as I did with all my rulings, I have said exactly on which ones I granted summary judgment and what discussion related to roman numeral one, arabic three, and roman numeral three, arabic two, and I think it's

clear that this is the area that has caused me more concern and more difficulty in making a decision than the other ones, because I do believe that even in a religious context, a secular statement could be made that could be the basis of imposing civil liability.

My analysis of whether or not the diagnoses or the claimed inaccurate diagnoses made in this case, whether or not there is a question of fact whether they are secular, I will take a similar analysis as the one I used in my other rulings on summary judgment; that is, there is evidence proffered by the Defendant, at least evidence of admissible nature, that suggests they are statements of a sincerely held religious belief. As (p. 17) the plaintiff indicated to me, any admissible evidence could create a question of fact that they weren't.

Frankly, before I read Defendant's brief and response that I received today, I was inclined to believed that, almost on their face, a statement of a specific diagnosis could create a question of fact as to whether it is a secular statement made within a religious context, could be the imposition of civil liability, or is merely another statement of a sincerely held religious belief within that religious context. Given what's in the brief and the teachings of the Christian Science Church as reflected by what I understand is their most important, if not their only, speaker of doctrine, Mary Baker Eddy, which to some extent I have to do to decide whether or not there is a question of fact, it seems to me there is much support for the claim that in order to pray effectively by a person like the individual defendants, there has to be some idea and labeling of what there is, at least a claim, so that the prayers can be tailored.

Consequently, I do see evidence that would be offered by the defendants that would, if briefed, establish that these were statements of a sincerely held religious belief.

(p. 18) Now, I must determine, as the plaintiff showed me, the evidence of an admissible nature to bring that into question. Again, what has been proffered is really asking either for an exception that statements involving the health of children should never be considered religious and should always be secular, or that somehow the context and the statement itself create the question of fact.

Here again, as I ruled previously, I don't see the admissible evidence that will bring into question whether or not any of these statements were other than statements of a sincerely held religious belief.

For that reason, I will grant summary judgment on this final claim also.

Before you leave, though, I want to indulge myself in my own postscript to this case.

I have put a lot of time in this case. I have tried to find those principles of law that I think, as a Judge, I must apply. At the same time, I have a philosophical human response to this case, and having ruled on all the issues I want to make a few comments about this case, the First Amendment, and our society, and it is this: That the First Amendment of the United States Constitution has probably been (p. 19) the vehicle for more freedom in a society than any other historical attempt at government,

but freedom costs. Freedoms flowing from the First Amendment have significant costs in our society.

The First Amendment forces our society to pay the human costs associated with negligent journalism that occurs without malice. The First Amendment forces our society to pay the human costs associated with the espousal of philosophies that cause severe disruption and even violence in our society, and the First Amendment, as I have ruled in this case, costs parents who lose their child as a result of adherence to religious dogma the right to attempt to recover damages from those whom they claim are directly responsible for the death of their child. That is a huge cost for freedom.

At the same time, as I take this action in this case, I must sincerely commend the ability, advocacy, and courage of the Plaintiffs and their attorneys for bringing this lawsuit.

I assume, being the excellent attorneys they are, that plaintiffs' attorneys realize that this type of case would be an uphill struggle. I believe that the bringing of this lawsuit, and lawsuits of this type, forces our society through its course to see (p. 20) exactly the costs associated with our First Amendment freedoms and how they impact in a given context.

Perhaps our appellate courts will say that this cost is too great in a given situation and create more limited exceptions to some of our First Amendment freedoms.

In any event, I believe all the parties in this case can hold their head high in recognition that they have been

involved in a case that helped strengthen our governmental system by testing some of its important principles, and I thank you very much.

APPENDIX C

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

ALAN A. MAY, Personal Representative of the Estate of Matthew Swan, Deceased, and DOUGLAS SWAN and RITA SWAN, Individually,

Plaintiffs,

-vs-

JEANNE LAITNER, JUNE AHEARN, and THE FIRST CHURCH OF CHRIST, SCIENTIST, in Boston, Massachusetts (The Mother Church), a foreign corporation, Jointly and Severally,

Defendants.

No. 80 004 605 NI

Hon. Richard C. Kaufman

DAVID W. CHRISTENSEN (P11863)
SHARON S. LUTZ (P24094)
JODY L. AARON (P34677)
Attorneys for Plaintiffs

DONALD J. MILLER (P17752)
Attorney for Defendant Laitner

RICHARD SUHRHEINRICH (P21130)
MONA K. MAJZOUB (P27382)
Attorneys for Defendant Ahearn

WILLIAM G. CHRISTOPHER (P27526)
CARL W. HERSTEIN (P26449)
DAVID M. HONIGMAN (P33146)
Attorneys for Defendant Church

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT UNDER GCR 117.2(3)

At a session of said Court held in the City of Detroit, County of Wayne, State of Michigan, on September 7, 1983.

PRESENT:
HONORABLE RICHARD C. KAUFMAN
Circuit Court Judge

This matter having come before this Court for hearing, and after hearing the arguments of counsel for the respective parties and having read the Motion and Briefs with respect thereto and the Court being otherwise fully advised in the premises and the Court having determined that the Motion of Defendants for Summary Judgment Under GCR 117.2(3) should be granted for reasons stated by the Court on the record:

NOW, THEREFORE, it is hereby ordered and adjudged as follows:

The Motion of Defendants JEANNE LAITNER, JUNE AHEARN and THE FIRST CHURCH OF CHRIST, SCIENTIST for Summary Judgment be, and hereby is, granted, and that each and every one of the allegations of Plaintiffs as set forth in the document entitled Allegations of Negligence and Misrepresentation filed by the Plaintiffs and attached hereto and incorporated herein (which contains the allegations made by Plaintiffs in their Complaint and otherwise) be, and hereby are, stricken.

/s/ RICHARD C. KAUFMAN
Circuit Court Judge

Dated: September 7, 1983

APPENDIX D

STATE OF MICHIGAN

COURT OF APPEALS

REVEREND RALPH BROWN, Personal Representative of the Estate of MATTHEW SWAN, Deceased,

Plaintiff-Appellant,

v

JEANNE LAITNER, JUNE AHEARN, and THE FIRST CHURCH OF CHRIST, SCIENTIST, in Boston, Massachusetts (The Mother Church), a foreign corporation, Jointly and Severally,

Defendants-Appellees.

DEC 17 1986

No. 73903

BEFORE: H. Hood, P.J., M.H. Wahls and J.T. Kallman*, JJ.

PER CURIAM

The personal representative of the estate of Matthew Swan, deceased, appeals as of right from an order granting summary judgment to defendants. The primary issue is whether US Const, Am I and Const 1963, art 1, § 4 preclude tort liability in this case where Christian Science practitioners, by their acts or omissions, allegedly caused Matthew's death.

---

*Circuit Court Judge, sitting on the Court of Appeals by assignment.

I

The Christian Science religion teaches that disease is the result of erroneous thinking and may be cured through faith and prayer. Members of the church may, through character references and documentation of three successful "healings", be listed in the Christian Science Journal as full-time "practitioners". Christian Science practitioners charge a modest fee for their services, which include concentration, prayer and denial of the idea of disease. Although house calls may be made, practitioners often operate at a distance in response to telephone conversations. Practitioners also pray about personal problems other than illness, *e.g.*, for success in finding a job or selling a house.

Matthew Swan's parents, Douglas and Rita Swan, were lifelong adherents of Christian Science at the time of Matthew's death. Rita Swan was a college instructor with a Ph.D. in English. When she was pregnant with Matthew, her obstetrician suspected that she had an ovarian cyst and scheduled an ultrasound diagnosis. Mrs. Swan contacted defendant Jeanne Laitner, a Christian Science practitioner, who agreed to give Christian Science treatment. The ultrasound diagnosis revealed no abnormality, and Mrs. Swan believed she had been healed. However, six months later the cyst twisted, and, in great pain, Mrs. Swan sought emergency medical treatment, which resulted in surgery. Laitner did not condemn her for turning to "materia medica" (the Christian Science term for medicine), but church regulations required her to temporarily discontinue her teaching of Sunday school.

In June, 1977, at the age of 15 months, Matthew Swan became fatally ill. Prior to that time, he had run fevers on three occasions, and, in each instance, his parents had contacted practitioners and the fevers had abated.

On Saturday, June 18, 1977, the Swans were alarmed that Matthew had a raging fever. They contacted defendant Laitner, who asked if the baby could be cutting a tooth. Contacted on several additional occasions over the weekend, Laitner told the Swans to try not to notice whether the fever was up or down.

On Monday and Tuesday, Laitner made house calls. The Swans were very frightened at Matthew's condition. He had not smiled, sat or stood since Saturday and was limp and unresponsive. Laitner said that Christian Scientists often exaggerated, expecting the worst. She gave Matthew a treatment, stating "God is your life, Matthew" and other spiritual statements.

Later on Tuesday, Mrs. Swan called Laitner and related that there was a little blood in Matthew's mouth. Laitner responded, "Well, in the first place you could be wrong and in the second place, if you are relying radically on God, it doesn't matter what the evidence is." Laitner also speculated that Matthew might be suffering from roseola.

On Tuesday evening, Laitner made another house call. She stated that she was "very encouraged". She further said, "Let's not say he is not making progress. He is making progress."

On Wednesday morning, Mrs. Swan called Laitner to say that Matthew's condition was very bad. Laitner

seemed angry with her and asked, "Why don't you put the good news first?" Laitner cautioned Mrs. Swan not to let her imagination run away with her. Later that day, Matthew fell out of bed but did not seem to be harmed by the fall. The Swans began to consider changing practitioners or turning to medicine.

On Thursday, June 23, 1977, Mrs. Swan called a second practitioner, defendant June Ahearn. Mrs. Swan told her that it was a desperate emergency, and Ahearn responded that she was "getting a strong message of temptation toward materia medica". Ahearn told Mrs. Swan, "You know materia medica can't help you." Ahearn also said that she did not need to see Matthew, that her job was to understand him as a spiritual idea. Ahearn suggested that Mrs. Swan write a letter of reconciliation to her father. When told that Matthew was gnashing his teeth, Ahearn speculated that perhaps he was planning some great achievement.

After being wakened several times through the night of Sunday, June 26, 1977, by Matthew's sudden, short cries of pain, the Swans resolved to turn to medicine. However, they first called Ahearn, who assured them that her treatment was working and that they would have "a long hard road back to Christian Science if [they] turn[ed] to materia medica". Ahearn reminded them that Mary Baker Eddy (the founder of Christian Science) had stated that medical diagnosis induces disease. Dissuaded, the Swans decided to continue with Christian Science treatment.

On Tuesday, Matthew moaned sporadically, was not blinking his eyes at normal intervals and appeared to

have no mental response. Ahearn recommended that the Swans read Christian Science articles. She claimed that she was working on the case and would not let up. She also asked the Swans not to call her so many times per day.

On Wednesday, Matthew began to have seizures. Ahearn made a house call in the evening. Matthew was moaning, and his arms and legs were in random motion. Ahearn took the movement as a sign of progress.

On Thursday, June 30, 1977, the 13th day of Matthew's illness, Mrs. Swan called Ahearn and again reported Matthew's grave condition. Ahearn recalled Matthew's fall off the bed a week earlier and reminded Mrs. Swan that Christian Scientists could visit doctors to have broken bones set. Ahearn suggested that the Swans could take Matthew to be x-rayed for a broken bone. She said, however, "Don't tell them about the fever and all this other." The Swans took Matthew to a hospital where he was diagnosed as having bacterial meningitis. When the couple hesitated to give consent for immediate neurosurgery, the doctor stated that the hospital would obtain a court order. The Swans then gave their assent.

Matthew died on July 7, 1977, as a result of brain abscesses secondary to meningitis.

II

In recent years, the subject of clergy malpractice has surfaced in legal circles and the popular press, fueled no doubt in large part by the ongoing proceedings in the case of *Nally v Grace Community Church of the Valley*, 204

Cal Rptr 303; 157 Cal App 3d 912 (1984) decertified for publication. The instant case is closely related to the clergy malpractice concept and presents many of the same issues and problems. The individual defendants, while not clerics, are nonetheless church workers and church doctrine is inextricably a part of their work. The tensions between religious freedom and the state and society's desire and need for regulation are patent.

Plaintiff[1] did not label a count as "Christian Science malpractice", but the allegations under the heading of negligence set forth such a claim. The complaint alleged that defendants owed a duty to perform their practitioner work in accordance with the rules and regulations of the Church of Christ, Scientist and had violated that duty in numerous particulars. The trial court characterized certain of those particulars[2] as inherently of a religious nature and concluded that they would draw the jury into the constitutionally impermissible task of interpreting and deciding church policy. Accordingly, the court partially granted the defendants' motions for accelerated judgment. GCR 1963, 116.1(2) [now MCR 2.116(C)(4)]. Plaintiff does not appeal the disposition of those motions.

In partially denying defendants' motions for accelerated judgment, the trial court retained those allegations of negligence and misrepresentation which were facially secular. The court noted, however, that those allegations might fail for evidentiary reasons if plaintiff's proffered proofs were ruled inadmissible because admission would involve the jury too deeply in religious matters.

On the eve of trial, defendants put plaintiff to a test of his proofs by way of motion for summary judgment,

handled by the court under GCR 1963, 117.2(3) [now MCR 2.116 (C)(10)]. On the hearing of the motion, the court considered plaintiff's allegations and the proofs offered in support thereof. The allegations were as follows:

Negligence of Individual Defendants[3]

1. Failed to frequently visit Matthew.

2. Failed to consult a doctor or report Matthew's condition to health officials.

3. Made inaccurate diagnoses.

4. Coerced Matthew's parents to not get medical help.

Negligence of Church

1. Failed to sufficiently train and educate practitioners and nurses in the treatment of small children.

2. Failed to instruct practitioners in the rudiments of communicable/notifiable disease so that reporting obligations could be carried out.

3. Failed to adequately monitor and supervise activities of the practitioners and nurses in their treatment of small children.

4. Failed to operate a healing system in such a way as to not cause damage to minor children.

Misrepresentation by Individual Defendants

1. That medical treatment would offer no solution to Matthew's health problems.

2. Inaccurate statements of specific diagnoses.

3. That medical diagnosis will induce disease.

4. That Matthew's condition was being healed.

5. That Matthew's health was improving and progressing.

6. That Matthew's health would be adversely affected by turning to medicine.

Misrepresentation by Church

1. That a practitioner could determine when a child was not progressing.

2. That a practitioner could determine when a child had a communicable/notifiable disease.

3. That there were available appropriately trained and educated nurses.

4. That Christian Science treatment provides healing of physical ailments.

Before addressing the individual allegations, the court set the ground rules by getting the parties' agreement to certain principles of law:

1. A statement of a sincerely-held religious belief cannot be the basis for a cause of action for misrepresentation.

2. A cause of action which necessitates competing testimony as to what church doctrine was and what it required of a person cannot be the basis of imposing civil liability.

In examining plaintiff's allegations and the proofs, it became apparent to the court and to the parties that judgment must be entered for defendants if the court's method was correct. Plaintiff acknowledged that he could not prove that the defendants did not sincerely believe the things they said. Plaintiff further recognized that for each allegation defendants could and would submit evidence of church doctrine on the subject.

A good example of the religious context of the allegations is provided by defense counsel's argument to the court concerning the first allegation of negligence by the individual defendants:

"He is putting us to the proof of our religious doctrines or beliefs. The minute he asks his client, 'What did you call Mrs. Laitner for?' – the minute he tries to introduce something about these defendants, we are going to be on our feet. That is, our only way we can protect our clients' constitutional rights is to prevent that evidence from ever going to the jury, because we have a constitutional right not to have our religious beliefs tried, and that is exactly what he is asking you to do. You can't under [*United States v] Ballard* [, 322 US 78; 64 S Ct 882; 88 L Ed 1148 (1944),] do it, and I don't think we ought to talk about this case in grand principles.

"I think we ought to do what you started out to do, and that is to pin them down under specific allegations and find out why it is that practitioners have to frequently visit. Well, you don't have to go very far. You go right to the text of their complaint. They said why they think practitioners have to frequently visit, and if [plaintiff's counsel] doesn't know why, he didn't read the discovery in this case, because his partner . . . questioned both of the Christian Science practitioners and every one of our witnesses out of a booklet put out by the Christian Science Church, because she read this right to our defendants and asked them about it: 'In children's cases it is

important for parents to give earnest consideration to engaging a practitioner listed in the Christian Science Journal, since state statutes accord some recognition to such practitioners. Furthermore, arrangements should be made' – this is again addressed to the parents – 'for a practitioner to visit any child promptly who is being treated for a condition which may be deemed serious and for the practitioner to make such visits frequently, if needed.'

"Now, their allegation in the complaint is quoted right out of that publication, and they used it in their discovery to question the defendants; and then, when we took the discovery of their clients, we asked them the same question, and our whole inquiry was directed at 'Why do you believe the practitioners should make frequent visits, and what is it that they have done that you think they should have done differently?'

"I will just read a few excerpts. This is from Mrs. Swan's deposition at pages 135 and 136:

" 'Question: Did Mrs. Ahearn ever relate to you that she didn't need to make house calls, because her job was understanding Matthew as a spiritual idea?

" 'Answer: Yes.'

"Then there are some questions about the timing of that.

" 'Question: Was that in response to a request by you that she make a house call?

" 'Answer: The subject may have been discussed peripherally. I did not make a formal request for a house call, and she did not say, "No, I will not come," but because she had initiated this judgment of a house call, I considered that it was counter-productive in her concept of Christian Science treatment.

" 'Question: The house call was counter-productive?

" 'Answer: Yes. When she said, "I do not need to see Matthew, because my business is understanding him as a spiritual idea," and I understand that to mean that, in her concept of Christian Science treatment, it was better for her to give absent treatment, staying at her house.'

"Now, as said at the beginning, discovery in this case is complete. The parties ought to know what the allegations are at this point, and they are not some common-man theory of liability. They are based on what the parties to this have said about this in their depositions. It is quite clear from Mrs. Swan's deposition, and there is similar comment in Mr. Swan's deposition, that they understood the concept of absent treatment in Christian Science, that, in the practitioners' concept of Christian Science treatment, they did not have to be present to pray for the child. That is what they understood. That is the context they took the statement to be in, and it ended up in this complaint."

Plaintiff of course did not concede judgment for defendants. He argued that the court's approach was wrong, that the real question was whether defendants had engaged in conduct which could be regulated and prohibited. Plaintiff argued that defendants' apparent religious speech nevertheless had a secular impact and thus was conduct and not pure belief. Plaintiff further argued that the defendants should not be able to set themselves apart from an objective standard of reasonableness established by society. Plaintiff thus rejected the court's standard of what a reasonably prudent Christian Science practitioner would do under the circumstances. Plaintiff asserted that a jury could determine that defendants had violated society's standard without regard to defendants' religious beliefs.

A

Plaintiff states the question involved on appeal as whether the state's *parens patriae* interest in children's welfare is sufficiently compelling to permit a common law action in ordinary negligence when religious conduct proximately causes the injury or death of an infant.

Plaintiff goes beyond mere consideration of the state's *parens patriae* interest to argue that the instant negligence action should be deemed one aspect of the state's exercise of its power for the protection of children. We think this argument is unprecedented and unwarranted. The state exercises its protective power as *parens patriae* through legislation and courts of equity. 42 Am Jur 2d, Infants, §§ 14-15, 22, pp 20-21, 27-28. Plaintiff offers no authority for the proposition that a common law negligence action in a court of law comes within the *parens patriae* doctrine. We decline to view plaintiff as standing in the shoes of the state with respect to the protection and care of dependent children.

Of course, saying that this is not a *parens patriae* action does not mean that we do not give full and complete consideration to society's interest in protecting children. Such consideration inheres in determining whether there is a duty, which requires a balancing of the societal interests involved along with the severity of the risk, burden upon defendants, likelihood of occurrence, and relationship between the parties. *Langen v Rushton*, 138 Mich App 672, 677; 360 NW2d 270 (1984), *lv den* 422 Mich 965 (1985), *citing Samson v Saginaw Professional Building, Inc*, 44 Mich App 658, 663; 205 NW2d 833 (1973), *aff'd* 393 Mich 393; 224 NW2d 843 (1975). See also *Friedman v*

Dozorc, 412 Mich 1, 22 fn 9; 312 NW2d 585 (1981); *Duvall v Goldin*, 139 Mich App 342, 349; 362 NW2d 275 (1984), *lv den* 422 Mich 974 (1985). Special rules for children are not unusual. *Moning v Alfono*, 400 Mich 425, 445; 254 NW2d 759 (1977), *reh den* 401 Mich 951 (1977), *supp* 402 Mich 958 (1978).

B

Plaintiff readily demonstrates that society's interest in the protection of children is exceedingly great. See *e.g.*, *Fisher v Fisher*, 118 Mich App 227, 232-233; 324 NW2d 582 (1982), *lv den* 414 Mich 919 (1982). Plaintiff also demonstrates that religious conduct protected by the First Amendment has been subordinated in many cases to interests of the state as *parens patriae*.[4] See *e.g.*, *Prince v Massachusetts*, 321 US 158; 64 S Ct 438; 88 L Ed 645 (1944) (child labor law prohibited Jehovah's Witness from allowing her niece to distribute religious literature on street corner); *Jehovah's Witnesses in Washington v King County Hospital Unit No 1*, 278 F Supp 488 (WD Wash, 1967), *aff'd* 390 US 598; 88 S Ct 1260; 20 L Ed 2d 158 (1968), *re den* 391 US 961; 88 S Ct 1844; 20 L Ed 2d 874 (1968) (blood transfusions may be ordered over religious objections of parents); *Dep't of Social Services v Emmanuel Baptist Pre-School*, 150 Mich App 254, 269-271; ___ NW2d ___ (1986) (church school prohibited from using "rod" for spanking children); *Fisher, supra* (sole custody awarded to one parent in spite of other parent's religious belief that joint custody required).

To the extent that plaintiff's argument suggests that the above cases predetermine the result of balancing the

child welfare and religious freedom interests, we disagree. It is improper to simply draw the conclusion that child welfare is the greater interest. We must examine the contours of the interests as they are presented in each case.

The freedom to believe is absolute; the freedom to act is subject to regulation for the protection of society. *Cantwell v Connecticut*, 310 US 296, 303-304; 60 S Ct 900; 84 L Ed 1213 (1940). Plaintiff posits that the proper question on appeal is whether permissible belief or impermissible conduct caused Matthew's death. This question ignores the fact that religious conduct is permissible and protected unless the state can show a compelling state interest in interfering with the conduct. Even then, the state must act in the least restrictive manner. *Thomas v Review Board of the Indiana Employment Security Division*, 450 US 707, 718; 101 S Ct 1425; 67 L Ed 2d 624 (1981). We find no merit in plaintiff's argument that a civil cause of action in negligence is the least restrictive means of regulating spiritual healing practices in accordance with a compelling state interest in child welfare.

We learn much about the public interest in protecting children by looking to legislation. Especially relevant to this case is the Child Protection Law, MCL 722.621 *et seq*; MSA 25.248(1) *et seq*. In this act, we find that the legislature has already engaged in a balancing of the interests in child protection and religious freedom. The Law addresses child abuse and neglect, the latter including the failure by a person responsible for the child's health or welfare to provide adequate medical care. MCL 722.622(d); MSA 25.248(2)(d). The Law requires that certain persons immediately report to the Department of

Social Services when they have reasonable cause to suspect child abuse or neglect. MCL 722.623(1); MSA 25.248(3)(1). A person required to report who fails to do so is civilly liable for the damages proximately caused by the failure. MCL 722.633(1); MSA 25.248(13)(1). While a variety of health professionals are required to report, no mention is made of Christian Science practitioners. That this is no accident is evident from the Medical Practice Act, which exempted Christian Science practitioners from licensing and from the oversight of the medical practice board:

> "This act or rules promulgated pursuant thereto do not apply to a person who, in good faith, ministers to the sick or suffering by spiritual means alone, through prayer, in the exercise of a religious freedom, if he does not use or prescribe drugs, medicine, or surgery or assume the title of, or hold himself out to be, a physician or surgeon." MCL 338.1817, MSA 14.542(17), repealed by 1978 PA 368; see now MCL 333.16171(d); MSA 14.15(16171)(d).

Furthermore, as to parents, the Child Protection Law specifically states that they shall not be considered negligent for the sole reason that, in legitimately practicing their religious beliefs, they do not provide specified medical treatment for their child. MCL 722.634; MSA 25.248(14). Section 14 goes on to state that the courts are not precluded from ordering the provision of medical services to a child where the child's health requires it.

For the purpose of this case, the above legislation is as or more important for what it does not do as for what it affirmatively requires. By not including or by specifically excluding religious healing practices from its reach,

the legislation indicates the state's self-imposed limitations on its rights and interests as *parens patriae*. It is also an indication of public policy in a more general sense with respect to care of children.

By not requiring religious parents and practitioners to ignore their beliefs in healing by spiritual means and to turn to medicine, which would be the most effective way of protecting sick children, the legislature has evidenced a policy in favor of the untrammeled exercise of good faith spiritual healing practices. Whether the balance reached by the legislature is constitutionally required, we need not decide. Should the legislature amend the Child Protection Law to include Christian Science practitioners among those who must report, then the question whether the practitioners could be civilly liable for failure to report would present us with another case. Suffice it to say, we think that in this case we can conclude on the strength of the existing legislation, rather than direct and sole reliance on the constitutional guarantee, that public policy militates against providing a cause of action based on good faith spiritual healing practices.

C

Plaintiff urges that defendants can be held liable by an objective secular evaluation of the reasonableness of their behavior without bringing in their religious beliefs and thus implicating the First Amendment. On the facts of this case, we are not persuaded.

If defendants had violated a statute designed to protect children so that their behavior was negligent *per se*, a

different result might be required. However, the "reasonable man" standard on which plaintiff relies does not provide a sufficiently secular standard. As the circuit court concluded, the "reasonable man" in this case would be a reasonably prudent Christian Scientist.

Plaintiff's effort to label this case as ordinary negligence involving a secular reasonable man must be to no avail. Courts do not let labels control a case where the substance is to the contrary. *In re Mahoney Estate*, ___ Mich App ___; ___ NW2d ___ (No. 81699, *rel'd* 8/4/86), slip op. at 7. Here, as the evidence indisputably showed, Christian Science parents obtained the services of Christian Science practitioners to bring healing to their child according to the dictates of Christian Science. Defendants convincingly showed in the court below that, if the case went to trial, Christian Science beliefs and teachings would be offered into evidence on each of plaintiff's allegations. The jury would not be able to avoid passing judgment on this evidence in determining whether defendants had acted reasonably. We are convinced that First Amendment religious freedom is inexorably implicated given the facts of this case.[5] We conclude that the trial court followed the correct approach and properly granted summary judgment to defendants.

Affirmed.

/s/ Harold Hood
/s/ Myron H. Wahls
/s/ James T. Kallman

FOOTNOTES:

[1] Matthew's parents originally were also plaintiffs, but they withdrew as parties to the suit after the appeal was filed.

[2] The complaint alleged *inter alia* that the defendants were negligent (1) in failing to report the case of Matthew Swan to the Committee on Publications, (2) in failing to send a Christian Science nurse to assess Matthew's case, and (3) in failing to communicate a change in Christian Science policy regarding medical treatment of minor children.

[3] The alleged negligence, and misrepresentations, of defendants Laitner and Ahearn was imputed to the corporate defendant under agency principles in accordance with the court's ruling on the church's motion for accelerated judgment. That ruling has not been appealed.

[4] It goes without saying that religious freedom is fundamental. US Const, Am I provides that Congress shall make no law prohibiting the free exercise of religion. The provision has been held to apply to the states. *Cantwell v Connecticut*, 310 US 296, 303; 60 S Ct 900; 84 L Ed 1213 (1940). Our Supreme Court has stated that Const 1963, art 1, §4 is subject to a similar interpretation as the federal provision. *Advisory Opinion re Constitutionality of PA 1970, No 100*, 384 Mich 82, 105; 180 NW2d 265 (1970), *app dis sub nom Smith v Eastern Orthodox Churches of Greater Detroit*, 401 US 929; 91 S Ct 938; 28 L Ed 2d 210 (1971). Our constitution also recognizes that religion is "necessary to good government and the happiness of mankind". Const 1963, art 8, §1.

[5] In *Baumgartner v First Church of Christ, Scientist*, 96 111 D 114; 490 NE2d 1319 (1986), US app pndg (1986), the Appellate Court of Illinois reviewed a similar case involving a mentally competent adult patient and concluded that the plaintiff's claim for ordinary negligence failed for the same reasons as her Christian Science malpractice claim. *Baumgartner* is consistent with the result we reach in the instant case.

APPENDIX E

Michigan Supreme Court
Lansing, Michigan

Dorothy Comstock Riley
Chief Justice

Order

Charles L. Levin
James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Dennis W. Archer
Robert P. Griffin
Associate Justices

Entered: March 7, 1988

80118
& (94)

THE REV. RALPH BROWN, Personal Representative of the Estate of Matthew Swan, Deceased,

Plaintiff-Appellant,

v

JEANNE LAITNER, JUNE AHEARN, and THE FIRST CHURCH OF CHRIST, SCIENTIST, in Boston, Massachusetts (The Mother Church), a foreign corporation, Jointly and Severally,

Defendants-Appellees.

SC: 80118
CoA: 73903
LC: 80-004-605-NI

On order of the Court, the motion to file amicus curiae brief in support of plaintiff-appellant's application for leave to appeal is GRANTED.

The application for leave to appeal is considered, and it is GRANTED, limited to the issues: (1) whether the religious exemption to Michigan's Medical Practice Act,

MCL 338.1817; MSA 14.542(17), repealed by 1978 PA 368; see now MCL 333.16171(d); MSA 14.15(16171) (d), applies to plaintiff's allegations that the defendant engaged in diagnosis, and (2) if the exemption does not apply, whether the allegations of diagnosis support a cause of action which may be implied from violation of MCL 338.1816; MSA 14.542(16), repealed by 1978 PA 368; see now MCL 333.16294; MSA 14.15(16294), prohibiting the unauthorized practice of medicine.

(SEAL) I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

March 7, 1988 /s/ Corbin R. Davis
Clerk

APPENDIX F

Michigan Supreme Court
Lansing, Michigan

Dorothy Comstock Riley
Chief Justice

Charles L. Levin
James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Dennis W. Archer
Robert P. Griffin
Associate Justices

Order

Entered: February 10, 1989

2 Nov '88

THE REV. RALPH BROWN, Personal Representative of the Estate of Matthew Swan, Deceased,

Plaintiff-Appellant,

SC: 80118
COA: 73903
LC: 80-004-605-NI

v

JEANNE LAITNER, JUNE AHEARN, and THE FIRST CHURCH OF CHRIST SCIENTIST in Boston Massachusetts (The Mother Church), a foreign corporation, Jointly and Severally,

Defendants-Appellees.
_____/

On order of the Court, plaintiff-appellant's motion to present supplemental authority is considered, and it is GRANTED. Upon consideration of the briefs and oral arguments of the parties, the order of March 7, 1988, which granted leave to appeal is VACATED and leave to

appeal is DENIED because the Court is no longer persuaded that the questions presented should be reviewed by this Court.

Archer, J., not participating.

Levin, J., dissenting: This Court granted leave to appeal limited to whether the religious exemption to the medical malpractice act[1] applies to plaintiff's allegation that the defendants engaged in diagnosis and whether those allegations support a cause of action inferred from violation of an act barring the unauthorized practice of medicine.[2]

The defendants in this Court argued that the issues on which this Court granted leave to appeal had not been briefed in the trial court or in the Court of appeals. The Court of Appeals, however, introduced the applicability of the statutory exemption, stating that it indicates that the Legislature declared a public policy in favor of the "untrammeled exercise of good-faith spiritual healing practices."

Extensive briefs were filed in this matter of public importance after this Court granted leave to appeal. The Court heard oral arguments.

The Court of Appeals stated that the plaintiff acknowledged that he could not prove that the defendants did not sincerely hold their religious beliefs, that plaintiff further acknowledged that a cause of action which necessitates competing testimony concerning church doctrine cannot be the basis of imposing civil liability, and that the defendant would be submitting evidence of church doctrine.

The plaintiff did not, however, acknowledge that it would be necessary, in order to establish his cause of action, for the court to make a determination regarding church doctrine. Simply because the defendant submits evidence on church doctrine does not establish that the plaintiff cannot maintain his cause of action without involving the court in a determination of church doctrine. And simply because the defendants sincerely hold their religious beliefs does not necessarily insulate them from civil liability for harm caused by their statements and conduct.

The opinion of the Court of Appeals recognized that although the plaintiff made the concessions referred to, plaintiff did not concede judgment for the defendants. As stated by the Court of Appeals: "Plaintiff asserted that a jury could determine that defendants had violated society's standard without regard to defendants' religious beliefs." Also: "Plaintiff posits that the proper question on appeal is whether permissible belief or impermissible conduct caused Matthew's death."

The question whether the public policy of this state, as evidenced in the statutes adverted to in this Court's order granting leave to appeal, bars the maintenance of plaintiff's cause of action is a question of law which, now that it has been raised by the Court of Appeals and this Court granted leave thereon, should be addressed by this Court.

The ultimate question is whether the conduct of the defendants in assessing the nature of the child's illness in combination with discouraging the parents from seeking medical assistance subjects them, as the practitioners or

the church that sponsored their activities, to civil liability to the child's estate for resulting damage as a matter of common law or in implementation of statutory mandate. If not, this Court should so declare. It would then be for the Legislature to consider whether remedial legislation is called for.

The cause should be remanded to the trial court with leave to plaintiff to amend his complaint and file a claim based on the statutes. The inquiry would be whether defendants engaged in diagnosis, an activity reserved to licensed physicians, or whether they engaged in spiritual healing alone, an activity exempted from the licensing requirements.

I

Matthew Swan's parents, Douglas and Rita Swan, were life-long adherents of Christian Science. Rita Swan was a college instructor with a Ph.D. in English. When she was pregnant with Matthew, her obstetrician suspected that she had an ovarian cyst and scheduled an ultrasound diagnosis. Rita Swan contacted defendant Jeanne Laitner, a Christian Science practitioner, who agreed to provide Christian Science treatment. The ultrasound diagnosis revealed no abnormality, and Rita Swan believed she had been healed. However, six months later the cyst twisted, and, in great pain, Rita Swan sought emergency medical treatment, which resulted in surgery. Laitner did not condemn her for turning to "materia medica" (the Christian Science term for medicine), but church regulations required her temporarily to discontinue teaching Sunday school.

In June, 1977, at the age of fifteen months, Matthew Swan became fatally ill. Prior to that time, Matthew had fevers three times, in November, 1976, April, 1977, and May, 1977. The Swans consulted practitioners Jeanne Laitner, June Ahearn, and Laura Metzger regarding the fevers. Each fever abated.

On Friday, June 17, 1977, the Swans communicated with Laitner because of concern over Matthew's knee. According to Laitner, they reported Matthew's listlessness and poor appetite. On Saturday, June 18, the Swans were alarmed because Matthew had a raging fever. They telephoned Laitner several times on Saturday and over the weekend. According to Rita Swan, Laitner said: "Do you think Matthew could just be cutting a big double tooth?", and "What could medicine do for Matthew? I suppose that they would give him a baby aspirin, but you can see that would not get to the real cause of the problem." Laitner denies she suggested that Matthew could be cutting a tooth, but Rita Swan states that Laitner repeated that statement to Douglas Swan Sunday morning. On Sunday evening, Laitner told the Swans not to notice whether Matthew's fever went up or down.

On Monday, June 20, Laitner made a house call. The Swans were apprehensive. Matthew had not smiled, sat, or stood since Saturday and was limp and unresponsive. Laitner observed that Matthew was quiet and listless. Rita Swan said that Laitner administered a Christian Scientist treatment stating "God is your life, Matthew, and God is your truth," and proclaiming Matthew's identification with the seven synonyms for God. Rita Swan also testified that Laitner said, "We're not just pouring out

hecatombs of gushing theories, this is a Christian Science treatment which must have its effect."

Rita Swan reported to Laitner that afternoon that Matthew tried to look at and point to a light in the bedroom and that it was an improvement, though she still believed Matthew's situation to be very serious. In a later conversation, she asked Laitner to make another house call. At the house, the Swans testified that Laitner told them that she had "learned a lot about disease in this business, you just naturally would, and I know that the Christian Scientists are nearly always wrong. They always or often exaggerate things, they always imagine the worst thing. It's a fascination with fear."

Laitner made another house call on Tuesday morning, June 21. Rita Swan testified that Matthew was limp, listless, and unable to move his arms or legs or hold his head up. He still had a fever, though it was not as violent as the raging fever of Saturday and Sunday. Rita Swan pointed out a small fever blister on Matthew's upper lip. Laitner administered a treatment similar to that of Monday morning. That afternoon, Rita Swan spoke to Laitner and said she noticed a little blood in Matthew's mouth. Rita Swan said that Laitner responded, "[W]ell, in the first place you could be wrong and in the second place, if you are relying radically on God, it doesn't make any difference what the evidence is." Laitner also stated that she was "trying to know that Matthew does not have a disease called roseola."

During the day, Douglas Swan suggested to Rita Swan that if Matthew was not healed within a couple of days they would have to go to a physician. Douglas Swan

also telephoned Laitner, and she told him that practitioners were asked to report to the Committee on Publications when a child was not improving. Laitner stated that in all her years of practice she had to do so only one other time and the case turned out well. She was considering reporting Matthew's case.

On Tuesday evening, Laitner made another house call. She stated that she was "very encouraged" and "Let's not say he is not making progress. He is making progress."

On Wednesday morning, Rita Swan called to say that Matthew's condition was still discouraging. Made uncomfortable by Laitner's unresponsiveness, Rita Swan said, "Well, he did seem a little better last night." Mrs. Swan stated that Laitner said that "it would have been nice if you had put the good news first, I find that people who do. . . ." Laitner also told her that on the basis of her visit Tuesday night, she did not think Matthew was as hot as his mother claimed or that the fever blister on Matthew's lip was anything to worry about. Laitner cautioned her not to let her imagination run away with her. Later that day, Matthew fell out of bed, but did not seem to be harmed by the fall.

On Thursday, June 23, 1977, Matthew for the first time absolutely refused to eat. The Swans discussed changing practitioners and turning to medicine. Douglas Swan called Laitner to dismiss her, and Rita Swan then called a second practitioner, defendant June Ahearn. Rita Swan said that Matthew had a fever, was listless, and was not eating. Ahearn agreed to provide treatments. The Swans and Ahearn spoke several times during the day.

Mrs. Swan claims that in one conversation, she indicated that Matthew was taking food again. Ahearn told them she was "getting a strong message of temptation toward materia medica," and that "materia medica can do nothing for you, you have to know that." Ahearn also said that she did not need to see Matthew, as her job was to understand him as a spiritual idea. Mrs. Swan maintains that Ahearn did not judge her for having used materia medica for her ovarian cyst, but said, "When you turned to materia medica, you are accepting its laws and then they can – these laws of materia medica can come back to you later and attack someone you love."

In a conversation Friday morning, Rita Swan explained to Ahearn that Matthew had a stiff spine. Ahearn responded that she was "working very diligently on the claim of paralysis." They discussed the Swans' estrangement from Rita Swan's father, and Ahearn agreed that it was a good idea for Rita Swan to write a letter of reconciliation to her father as it would clear her thinking. Also on Friday, Rita Swan called Laitner at her office to report that Matthew was making progress.

On Saturday, June 25, the Swans did what they could to keep from unnecessarily moving Matthew's spine. They used a fan on Matthew to cool him, and they took him to the cooler basement from time to time. At mid-morning, they took Matthew for a car ride. They spoke later to Ahearn, whom they claim said that they did not have to watch over him all the time "like a hawk" and that she was "doing the work." The Swans told her that Matthew had been gnashing his teeth. They maintain that

Ahearn did not respond to this until Tuesday or Wednesday, when she said that perhaps Matthew was planning some great achievement.

Ahearn made a house call after church on Sunday, June 26. She spent time alone with Matthew and stated that he seemed perfectly normal to her at the time. She advised the Swans not to have the fan blowing directly on their son.

During Sunday night and early Monday morning, June 26 and 27, Matthew awakened the Swans several times with sudden, short cries of pain. The Swans claim that at 1:15 Monday morning they called Ahearn to tell her of Matthew's condition. Rita Swan said that Ahearn spoke of "mental malpractice" or mental interference with her treatment. Mrs. Swan understood the reference to be to Laitner, the first practitioner on the case. However, Ahearn maintains that they spoke at 1:15 *a.m.* on Tuesday and that it was Rita Swan who feared malpractice from her family. Later, the Swans resolved to turn to medicine. They waited until the morning to obtain someone to stay at home with their daughter. They called Ahearn to report that they had decided to go to a doctor and that she was dismissed. Rita Swan maintains that Ahearn reaffirmed her absolute confidence in her work and that a healing was taking place. Rita Swan also claims that Ahearn told her she would "have a long, hard road back to Christian Science if [they] turn[ed] to materia medica." Rita Swan brought up their responsibility to report contagious disease to the health department. The Swans state that Ahearn told them they paid too much concern to the opinions of others, that the idea of contagion had never occurred to her as something to handle

during the treatment, and reminded them that Mary Baker Eddy (the founder of Christian Science) had stated that medical science induces disease. Dissuaded, the Swans decided to continue with Christian Science treatment. Rita Swan stated that when she called Ahearn that night to report that Matthew was not blinking his eyes at normal intervals, Ahearn responded that the Swans' fears were holding things up.

On Tuesday, June 28, Rita Swan called Ahearn, repeating Matthew's eye problem and mentioning his sporadic moaning and lack of mental response. Rita Swan maintains that Ahearn told them to read Christian Science writing on fever and paralysis. Rita Swan further maintains that Ahearn denied her suggestion of strep throat, saying, "If he had strep throat, he would not be able to swallow." According to Rita Swan, although Ahearn had earlier denied her own prior concern for paralysis, stating, "If he had paralysis, he would not be able to wiggle his toes," she now recommended Christian Science reading on paralysis. Furthermore, Rita Swan testified that Ahearn claimed that she was working on the case, stated that she would not let up, and asked the Swans not to call her so many times a day.

On Wednesday, June 29, Rita Swan said that she spoke to Ahearn in the morning regarding Matthew's continual moaning. She said that Ahearn told her it was nothing to worry about. Matthew later had a convulsion, and Rita Swan called Ahearn to request Christian Science treatment. Ahearn agreed. According to Rita Swan, Ahearn told a story of another Christian Scientist who had seen a doctor and she concluded with, "you see, those doctors don't want to see you. You don't belong

there." Ahearn offered to make a house call and did so. Mrs. Swan claims that Matthew was moaning, and his arms and legs were in random motion. However, Ahearn claims that Matthew's limbs were free and took the movement as a positive sign. She maintains that Rita Swan seemed free from worry. According to Rita Swan, Ahearn stated during the house call that she had diligently handled the claims of paralysis and rheumatic fever.

Rita Swan reports that on Thursday, June 30, 1977, the thirteenth day of Matthew's illness, she called Ahearn to tell her that Matthew was moaning, deranged, and delirious. Ahearn recalled Matthew's fall off the bed a week earlier and reminded Rita Swan that Christian Scientists could visit doctors to have broken bones set. Rita Swan maintains that Ahearn said to her: "Don't tell them about the fever and all this other." The Swans contacted a pediatrician and made an appointment for the following morning. They decided, however, not to wait until then and took Matthew to a hospital emergency room at 4:30 *p.m.*

Dr. Sharon Knefler, a resident in pediatrics at the hospital, examined Matthew. She testified that Rita Swan told her that the child had a stiff neck and high fever for one week, and recurrent fever since November. She determined that he was pale and nonresponsive. He was dehydrated and his mouth was coated with white, dry material. He was seizuring and there was jerking of both legs and arms. Dr. Knefler's diagnosis was brain abscess caused by bacterial meningitis. A skull x-ray was taken, showing that the parts of the skull that should be closed at Matthew's age were widely split, indicating increased intracranial pressure. A neurosurgeon was called. When

the Swans hesitated to give consent for immediate neurosurgery, the doctor stated that the hospital would obtain a court order. The Swans then consented to the neurosurgery.

Matthew died the following Thursday, July 7, 1977, as a result of brain abscesses secondary to meningitis.

Dr. Knefler testified that the critical time for treating bacteral meningitis is the first seventy-two hours from the onset of the fever. She also testified that among survivors of the disease there is about a thirty percent chance of residual long-term deficit, such as deafness, blindness, and so on, even assuming the best medical care. Defendants' expert, Dr. Ralph Gordon, testified that there is eight to ten percent mortality among children with the disease. He said that the disease is curable in fifty percent of the cases without deficit, and that fifty percent of the children who survive have some sort of deficit ranging from learning problems to the more severe, such as blindness. In general, Dr. Gordon maintains that the outlook is better with aearlier diagnosis and treatment, consisting most commonly of the antibiotics ampicillin and chloramphenicol.

II

An action was commenced by the personal representative of the estate of Matthew Swan, against The First Church of Christ, Scientist ("the Mother Church") and the two Christian Science practitioners, Jeanne Laitner and June Ahearn. The defendants were charged with negligence and misrepresentation.

Defendants removed the case to the United States district court pursuant to 28 USC 1441 and 28 USC 1446. That court remanded the cause to Wayne Circuit Court, finding that plaintiff's claim did not arise under the Constitution of the United States within the meaning of 28 USC 1331. Defendants then sought summary and accelerated judgment.

The circuit judge issued two opinions limiting the scope of the lawsuit. He ruled that plaintiff had failed to state a cognizable cause of action as to inherently religious claims that alleged violation of Church-imposed standards of care and those that would required the jury to interpret Church doctrine. Secular claims were retained, including a claim that the Church was negligent because the practitioners failed to make accurate diagnoses.

The case was set for trial. A number of pretrial motions had been filed. Another circuit judge opened the proceedings by calling upon counsel to discuss certain issues of law, rather than considering the motions seriatim. The first issue was whether religious beliefs could be the evidentiary basis for imposition of civil liability. The second was whether the court was precluded from hearing claims the resolution of which would require the court to hear evidence of church doctrine or principles.

The judge reviewed the allegations against the Mother Church and Laitner and Ahearn. Plaintiff argued that the judge should examine the defendants' conduct to determine whether it was constitutionally protected. The

judge granted the defense motions, ruling that the plaintiff could not establish his claims without a constitutionally impermissible inquiry into the sincerity of defendants' religious beliefs. See *United States* v *Ballard*, 322 US 78; 64 S Ct 882; 88 L Ed 1148 (1944). In relation to plaintiff's negligence claims, he ruled that application of the reasonable care standard in this case required defendants' conduct to be measured by what a "reasonably prudent Christian Science practitioner" would do under the circumstances.

III

The issue considered by the Court of Appeals was whether the state's *parens patriae* interest in children's welfare is sufficiently compelling to permit a common-law action in ordinary negligence when religious conduct proximately causes the injury or death of an infant. The Court of Appeals held that a private negligence action is not part "of the state's exercise of its power for the protection of children," and that plaintiff's "argument is unprecedented and unwarranted."

In addressing this issue, the Court of Appeals attempted to balance the right of religious freedom and Matthew Swan's right to life-saving medical treatment. The Court of Appeals found that the public policy of Michigan favors "the untrammeled exercise of good-faith spiritual healing practices."[3] In ascertaining such public policy, the Court relied in part on its construction of the religious exemption set forth in the Medical Practice Act:

> "This act or rules promulgated pursuant thereto do not apply to a person who, in good

> faith, ministers to the sick or suffering by spiritual means alone, through prayer, in the exercise of a religious freedom, if he does not use or prescribe drugs, medicine, or surgery or assume the title of, or hold himself out to be, a physician or surgeon. MCL 338.1817, MSA 14.542(17), repealed by 1978 PA 368; see now MCL 333.16171(d); MSA 014.15 (16171) (d)."

The plaintiff argued that the defendants should be held subject to liability pursuant to an objective secular evaluation of the reasonableness of their behavior without consideration of their religious beliefs or implicating the First Amendment. The Court of Appeals found, however, that the "reasonable man" standard on which plaintiff relied did not provide a sufficiently secular standard. The Court of Appeals agreed with the circuit court's conclusion that a "reasonable man" in this case would be a reasonably prudent Christian Scientist.

The Court of Appeals suggested, however, that "If defendants had violated a statute designed to protect children so that their behavior was negligent per se, a different result might be required." In making this suggestion, the Court of Appeals seems to have acknowledged that plaintiff's claim of ordinary negligence measured by a secular standard might indeed be a cognizable cause of action. The Medical Practice Act appears to have been designed to protect the public – both children and adults. A violation might be negligence per se and render the defendants subject to civil liability.

Although the Court of Appeals declared that the act exempted Christian Science practitioners, the exemption may be narrower than the Court assumed. The Legislature has attempted to balance religious freedom and the

interest in saving human lives under the Medical Practice Act.

IV

Plaintiff devoted most of his brief and oral argument to an effort to convince this Court that this cause should be remanded for trial to determine whether defendants had medically diagnosed Matthew Swan in violation of the Medical Practice Act. The act allows an exemption from the licensure provision for religious or ritual healers who use spiritual means alone to heal. Plaintiff argued that when defendants suggested that Matthew had particular illnesses or diseases, they went beyond permissible spiritual means alone to cure and entered the realm of medical diagnosis, forbidden to unlicensed practitioners.

Defendants argued that plaintiff is barred from asserting a violation of and cause of action under the Medical Practice Act because such a claim was not raised until after this Court's order granting leave to appeal was issued. Although the plaintiff had not alleged a violation of the act, the Court of Appeals broached the question whether defendants were diagnosing or exceeding the boundaries of spiritual healing alone, a question not readily resolved without factual determination by a jury and briefing.

Defendants also argued that there is no implied cause of action under the Medical Practice Act. Defendants argued that in *Janssen* v *Mulder*, 232 Mich 183; 205 NW 159 (1925), the Court held that a violation of a licensure statute did not create an implied right of action. Defendants posed in their briefs several additional questions

concerning whether plaintiff can make a claim under the Medical Practice Act at all and, if so, whether such a claim would result in the imposition of liability. Defendants argued that since the practitioners offered their services as spiritual healers and any alleged diagnoses were made as part of this spiritual activity, their acts were within the exemption of the Medical Practice Act. Defendants further argued that a determination whether they were engaging in diagnoses or religious healing would require analyses of their sincerely held religious beliefs and church policy, thus implicating the First Amendment. Finally, defendants asserted that they had no common-law duty to provide medical care to Matthew, only to act as reasonable Christian Scientists.

V

This appeal presents issues that affect many children. Because of the gravity of the issues and the questionable analysis by the Court of Appeals, this cause should be remanded to the trial court with leave to the plaintiff to amend his complaint[4] alleging a claim under the Medical Practice Act.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

(SEAL)

February 10, 1989

/s/ Corbin R. Davis
Clerk

FOOTNOTES

[1] MCL 338.1817; MSA 14.542(17), repealed by 1978 PA 368; see MCL 333.16171(d); MSA 14.15(16171) (d).

[2] MCL 338.1816; MSA 14.542(16), repealed by 1978 PA 368; see MCL 333.16294; MSA 14.15(16294).

[3] In *Walker* v *Superior Court of Sacramento Co*, 47 Cal 3d 112, ___; 253 Cal Rptr 1, 17; 763 P2d 852 (1988), the California Supreme Court stated, in rebutting defendant's arguments that California's various statutory exemptions enacted for Christian Scientists demonstrate a legislative acceptance of the reasonableness of their spiritual care that is incompatible with a finding of "gross, culpable, or reckless" negligence, that "California's statutory scheme reflects not an endorsement of the efficacy or reasonableness of prayer treatment for children battling life-threatening diseases but rather a willingness to accommodate religious practice when children do not face serious physical harm."

See also *Molko* v *Holy Spirit Assn*, 46 Cal 3d 1092; 252 Cal Rptr 122; 762 P2d 46 (1988), *Nally* v *Grace Community Church of the Valley*, 47 Cal 3d 278; 253 Cal Rptr 97; 763 P2d 948 (1988).

[4] In *Kreski* v *Modern Wholesale Electric Supply Co*, 429 Mich 347, 1215; 415 NW2d 178 (1987), this Court in denying rehearing said:

"In this cause a motion for rehearing is considered and, on order of the Court, is hereby denied without prejudice to plaintiff's ability to present a motion to amend her pleadings to the trial court."

Similarly, see *Juncaj* v *C & H Industries* and *Allstate Ins Co* and *Second Injury Fund*, 432 Mich ___ (1989), amending this Court's judgment to provide for further proceedings on remand.

The opinion of the Court of Appeals in the instant case filed December 17, 1986, stated that "[we] conclude that the trial court followed the correct approach and properly granted summary judgment to defendant. Affirmed." The remittitur was issued by the chief clerk on January 13, 1987, and provides:

"This cause having brought to this Court by appeal and, after due consideration, the Court having issued its opinion;

"IT IS NOW ORDERED by the Court that this cause be and the same is hereby remanded to the trial court or tribunal for entry of judgment or any other necessary action in accordance with the opinion attached hereto and incorporated as part of this order, and for notice by the clerk of the lower court or tribunal to counsel as required by MCR 7.210(J). Under MCR 7.215(E) the attached opinion is the judgment of this Court."

It is stated in 7A Callaghan, Michigan Pleading & Practice, § 58.96, p 518:

"There can be no amendment of the pleadings contrary to the directions of the mandate, express or implied. Ordinarily the trial court, after remand, may permit an amendment of the pleadings, where not contrary to the decision of the appellate court on appeal. However, denial of application to amend is within the discretion of the trial court, and should be refused in a proper case. The appellate court may in a proper case direct that after remand an amendment shall be allowed by the trial court, and it may provide that a party, on remand, may amend his pleading as of right, subject to objection to the contents of the amendment by the opposite party. The court of appeals may also remand to correct a defect in process."

See also MCR 2.116(I) (5) and *Parisi* v *Michigan Twps Ass'n*, 123 Mich App 512; 332 NW2d 587 (1983).

See also *Int'l Ladies' Garment Workers' Union* v *Donnelly Garment Co*, 121 F2d 561 (CA 8, 1941); *Holland* v *Parker*, 469 F2d 1013 (CA 8, 1972); *City of Columbia, Mo* v *Paul N Howard Co*, 707 F2d 338, 341 (CA 8, 1983); *Jones* v *St Paul Fire & Marine Ins Co*, 98 F2d 448 (CA 5, 1938); *Feldmann* v *Connecticut Mut Life Ins Co*, 57 F Supp 70 (ED Mo, 1944); *Swift* v *Kniffen*, 706 P2d 296 (Alas, 1985); *O'Quinn* v *Manuel*, 773 F2d 605 (CA 5, 1985); *Cardenas* v *Smith*, 236 U.S App DC, 78; 733 F2d 909 (1984); *United States* v *Hayes Int'l Corp*, 456 F2d 112 (CA 5, 1972). But see *Denny* v *Barber*, 576 F2d 465 (CA 2, 1978).

APPENDIX G

Order

Entered:
May 31, 1989

80118
(118)

Michigan Supreme Court
Lansing, Michigan

Dorothy Comstock Riley
Chief Justice

Charles L. Levin
James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Dennis W. Archer
Robert P. Griffin
Associate Justices

THE REV. RALPH BROWN, Personal Representative of the Estate of Matthew Swan, Deceased,

Plaintiff-Appellant,

v

JEANNE LAINTNER, JUNE AHEARN, THE FIRST CHURCH OF CHRIST SCIENTIST in Boston, Massachusetts (The Mother Church), a foreign corporation, Jointly and Severally,

Defendants-Appellees.

SC: 80118
CoA: 73903
LC: 80-004-605-NI

On order of the Court, the motion for reconsideration of this Court's order of February 10, 1988, is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

Levin, J., would grant reconsideration and leave to appeal.

Archer, J., not participating.

10523

(SEAL)

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court. May 31, 1989

/s/ Corbin R. Davis, Clerk.